Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1994

TNS, INC.

Petitioner,

v.

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW REQUIRED BY S. CT. RULE 14.1(a)

Consistent with administrative review principles developed by this Court and circuit courts of appeals, may a Decision and Order of the National Labor Relations Board, which meets all the criteria for a reviewable final agency action set forth in 29 U.S.C. §§ 153(b) and 160(f), be set aside and remanded by a United States Circuit Court of Appeals on grounds that a two-member plurality opinion does not provide a "discernable" basis for review of the Decision and Order?

LIST OF ALL PARTIES TO PROCEEDINGS BELOW REQUIRED BY S. CT. RULE 14.1(b)

1. Oil, Chemical & Atomic Workers International Union, AFL-CIO
2. National Labor Relations Board
3. TNS, Inc.[1]

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[1] *List Required by S. Ct. Rule 29.1 Naming All Parent Companies and Subsidiaries of TNS, Inc.*: TNS, Inc., incorporated in and by the State of Tennessee, is a wholly-owned subsidiary of Aerojet-General Corporation (an Ohio corporation), which is a wholly-owned subsidiary of GenCorp Inc. (an Ohio corporation).

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STATUTES

National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.):

Section 3(b) 2, 13, 14, 17

Section 10(f) 3, 7, 9, 13, 14

Section 160(f) 10

Labor Management Relations Act (29 U.S.C. § 143):

Section 502 ..... *passim*

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REFERENCE TO THE REPORTS OF OPINIONS DELIVERED IN THE CASE BY OTHER COURTS AND ADMINISTRATIVE AGENCIES REQUIRED BY S. CT. RULE 14.1(d)

The United States Court of Appeals for the District of Columbia's opinion below, *Oil, Chemical and Atomic Workers International Union, AFL-CIO v. NLRB*, is reported at ___, U.S. App. ___, 46 F.3d 82, 1995 U.S. App. LEXIS 2747 (D.C. Cir. Feb. 14, 1995). The underlying National Labor Relations Board decision is reported as *TNS, Inc.*, 309 N.L.R.B. 1348, 1992 NLRB LEXIS 1538, 142 L.R.R.M. (BNA) 1046, 1992-93 NLRB Dec. (CCH) 17643 (1992).

This case was previously before the D.C. Circuit with regard to different issues. The D.C. Circuit's decision there is reported as *Oil, Chemical and Atomic Workers International Union, AFL-CIO v. NLRB*, 256 U.S. App. D.C. 370, 806 F.2d 269, 123 L.R.R.M. (BNA) 3129, 105 Lab. Cas. (CCH) 12091 (D.C. Cir. 1986). The Board's decision on remand is reported as *TNS, Inc.*, 288 N.L.R.B. 20, 1988 NLRB LEXIS 53, 128 L.R.R.M. (BNA) 1049, 1987-88 NLRB Dec. (CCH) 19252 (1988).

There are no other related cases of which counsel is aware before any other court or agency, either pending or decided.

STATEMENT OF GROUNDS FOR INVOKING JURISDICTION OF THIS COURT REQUIRED BY S. CT. RULE 14.1(e)

The date of the opinion and order sought to be reviewed is February 14, 1995. The date of the order

denying rehearing in the case is April 24, 1995. The date of the entry of the judgment is May 25, 1995.

This Court has jurisdiction to review the judgment of the D.C. Circuit pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS REQUIRED BY S. CT. RULE 14.1(f)

Labor Management Relations Act § 502, 29 U.S.C. § 143

Nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter.

National Labor Relations Act § 3(b), 29 U.S.C. § 153(b)

(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate

and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

National Labor Relations Act § 10(f), 29 U.S.C. § 160(f)

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the

record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE

The case arose from TNS, Inc.'s ("TNS") decision to permanently replace employees who had engaged in a work stoppage immediately following the expiration of the existing collective bargaining agreement on April 30, 1981. The collective bargaining representative, the Oil, Chemical & Atomic Workers International Union, AFL-CIO ("Union"), filed unfair labor practice charges alleging, *inter alia*, violations of National Labor Relations Act ("NLRA") Sections 8(a)(1) and (3). The Union claimed that the employees could not be permanently replaced because they were engaged in a work stoppage over conditions alleged to qualify as "abnormally dangerous" under Labor Management Relations Act ("LMRA") Section 502. More specifically, the Union argued that the employees had walked out over management's alleged failure to address employee concerns about exposure

levels for carcinogenic and toxic dust particles produced by the manufacturing processes used by TNS. Although the Union's theory concerning Section 502's insulation of the employees from permanent replacement was entirely novel, the National Labor Relations Board's General Counsel adopted the Union's premise in an unfair labor practice complaint filed in August of 1982.

After hearings on the matter in 1983 and 1985, an Administrative Law Judge finally issued a decision and recommended order on July 21, 1987 in which she found against TNS. The full National Labor Relations Board ("NLRB" or "Board"), sitting with a quorum of four members, reversed the Administrative Law Judge by a 3-1 vote and issued a Supplemental Decision and Order ("Board's Decision") on December 23, 1992 dismissing the complaint on grounds that the strike was not a work stoppage within the meaning of LMRA Section 502. The Board reasoned that, in the absence of any protection which Section 502 might have provided the strikers from the normal rules relevant to economic strikes, the employees could be lawfully permanently replaced.

The Board majority was comprised of a two-member plurality and a one-member concurrence, each of which developed and applied separate tests for determining Section 502's coverage in the context of employee exposure to carcinogenic or toxic substances. The plurality ("Plurality") held that under a two-pronged objective test the General Counsel had failed to show that the employees reasonably believed conditions were "abnormally dangerous" at the time of the walkout. *See TNS, Inc.*, 309 N.L.R.B. 1348, 1355-61 (1992). The concurrence ("Concurrence") held that Section 502 was inapplicable

regardless of whether the conditions at issue were "abnormally dangerous." *See id.* at 1368-71. Citing the language of Section 502 and Supreme Court interpretation thereof, the Concurrence held that when, as in this case, the conditions at issue were not the "sole cause" of the work stoppage, the mixed-motives of the employees for the work stoppage took it outside the scope of Section 502. Based upon these two opinions, the Board's 3-1 majority dismissed the complaint against TNS.

Subsequently, the Union timely filed a Petition for Review of the Board Decision with the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). On February 14, 1995, a three-judge panel ("Panel") issued an Opinion and Order remanding the case to the Board. *Oil, Chemical & Atomic Workers, Internat'l Union, AFL-CIO v. NLRB*, 46 F.3d 82 (1995). Although the Panel reviewed and rejected the Concurrence to the Board's December 23, 1992 Order, it flatly refused to consider the admittedly "defensible" grounds set forth in the Plurality's opinion. The Panel justified ignoring the Plurality's extensive and well-developed rationale for dismissing the complaint by citing the fact that it was supported by only two of the four members hearing the case. Based upon this reordering of the votes cast by the Board members, the Panel held simply that the Board's Order was not reviewable because "the Board's position on the underlying substantive issue cannot be discerned. . . . " *Id.* at 84. The Panel thereafter remanded the case to the Board to "articulate a majority-supported statement of the rule that [it] will be applying now and in the future . . . in determining the applicability of Section 502 in the context of occupational exposure to

low-level radiation." *Id.* at 92. [citation and internal quotes omitted]. Following denial of TNS' Petition for Rehearing and Suggestion for Rehearing *En Banc* on April 24, 1995, TNS filed the instant Petition for a Writ of Certiorari.

STATEMENT OF BASIS FOR FEDERAL JURISDICTION REQUIRED BY S. CT. RULE 14.1(i)

The basis for federal jurisdiction in the court of first instance in this matter was NLRA Section 10(f), 29 U.S.C. Section 160(f).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

In Accordance with Statutory Authority and the Decisions of this Court and of Circuit Courts of Appeals, the Plurality Opinion was a Discernable and Defensible Rationale for a Final Decision of the Board Which the D.C. Circuit was Obligated to Review.

If allowed to stand by the Supreme Court, the Panel's opinion in this case will artificially restrict access to judicial review and undermine the administrative process by permitting a court of appeals to bypass reasoned and open review in favor of a selective and silent disregarding of disfavored but legally sound bases for final agency action. Supreme Court intervention under the Court's recognized power to supervise the United States courts of appeals is thus required to prevent the D.C. Circuit from

establishing a form of administrative remand which conflicts with established doctrines in the area and which will be a serious hindrance to effective administration of all federal laws wherein agency decisionmaking is subject to judicial scrutiny.

The discussion below is divided into three parts. First, the discussion details the internal analytical flaws in the Panel's reasoning in relation to a circuit court's obligation to provide full review of a final agency order. The discussion then examines the Panel's attempt to justify remand by analogizing this case to other instances wherein cases have been remanded to the Board for further proceedings. The discussion concludes by showing that the Panel's approach is both unsupported by general remand practice and is in conflict with principles developed by both this Court and the other Circuit Courts of Appeals relating to agency reliance on multiple grounds for an action.

Concerning the analysis utilized in the opinion below, the Panel inexplicably reviewed and rejected one of the Board Decision's supporting opinions, but then professed not to be able to review the other opinion because its existence had somehow been rendered "undiscernible." TNS submits that the Panel's reasoning in this regard is not a viable basis for remanding the case to the Board.

The Panel advanced two interlocking grounds for finding that no reviewable Board action had taken place under these circumstances; *i.e.*, that the Concurrence was legally unsound and that, as a consequence of this unsoundness, the remaining Plurality need not be

reviewed as it was supported by "only" two of the four Board members. Nevertheless, it is clear that the first of these purported grounds is insubstantial. The Panel's harsh criticism of the legal basis for the Concurrence cannot in any sense support its dramatic leap of logic to the conclusion that the Plurality opinion should be rejected without comment. This flaw is obvious from the fact that only two of four votes would have supported the Plurality position even had the Concurrence adopted a legally "defensible" alternative rationale for its position. Accordingly, the Panel's selective attack on the Concurrence provides no actual logical support for its second conclusion that the case should be remanded in lieu of reaching the merits of the Plurality view. In effect then, the Panel simply held that a plurality-supported decision of the Board is the equivalent of no decision at all.

The Panel's discarding of the Board's Decision because it was only plurality-supported fails to overcome the strong presumption of reviewability which attaches to the final actions of the Board or any federal agency. A fundamental guarantee of both the National Labor Relations Act and the federal administrative scheme in general is the right of parties to the administrative process to seek timely and complete judicial review of an agency's final order. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-71 (1986) (noting "strong presumption" that Congress intends judicial review of administrative action, which should be restricted only on clear and convincing evidence of contrary legislative intent). In this regard, NLRA Section 10(f) no where provides that a Circuit Court may sidestep complete review of the NLRB's disposition of a case and substitute

a requirement that an otherwise final and valid agency action be reopened to produce a vote count more to the Circuit Court's liking. Rather, upon filing of a petition for review, a Circuit Court has the power to "make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board . . . . " 29 U.S.C. § 160(f). In this case, however, the Panel did none of these things and chose instead to disturb the finality of the Board's action by remanding the case for another, different decision and order, thereby effectively nullifying the Board's initial decision simply because it was comprised of a plurality opinion and a concurring opinion.

The Panel's insistence on a Board rationale supported by a unanimous majority was based upon a subtle and disingenuous blurring of the analytical lines between the issue of the Board Decision's subsequent precedential value (for which remand to the Board is not warranted) and the issue of whether reviewable agency action has taken place (which could support remand where a definitive final action is absent). The only support which the Panel could muster for its proposition that no "discernable" test had been articulated by the Plurality was a reference to a footnote in *Mohawk Liqueur Co.*, 300 N.L.R.B. 1075, 1075-76 n.3 (1990), *enforced sub nom. General Indus. Employees Union, Local 42 v. NLRB*, 293 U.S. App. D.C. 41, 951 F.2d 1308 (D.C. Cir. 1991):

> In [a prior case] the Board plurality opinion rejected this doctrine, but there was no holding on the issue because the vote was split 2-2 on this point.

Oil, Chemical and Atomic Workers Union, 46 F.3d at 91 n. 5 (internal quotes omitted). Although miscast in terms of reviewability, the Panel's only substantive concern was obviously that the Board's Plurality decision, even if defensible policy, will be viewed only as persuasive, rather than dispositive, authority on the Section 502 issue presented in the case. However, the Panel's premature speculation on whether or not the Plurality opinion within the TNS majority will ultimately be treated as controlling precedent in future Board cases is an irrelevant consideration to the Panel's present refusal of the judicial review to which the parties are entitled to under NLRA Section 10(f). *See Bowen, supra*, 476 U.S. at 670-71 (strong presumption of reviewability rebuttable only on clear and convincing evidence no review intended). In the absence of a clear Congressional mandate to the contrary, such matters as the weight to give precedent are best resolved through subsequent decisions of the Board, *not* a remand to undo a final decision.[2]

The Panel herein did more than simply reject the Concurrence's reasoning as insufficient; the Panel actually rejected the Concurrence's *vote* for dismissal of the complaint and alchemized it into a dissenting vote. The Panel's revisionist calculus caused a 3-1 vote for dismissal to metamorphose into a 2-2 deadlock from which no reviewable decision and order had supposedly issued. *See Oil, Chemical and Atomic Workers Union*, 46 F.3d at 94.

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[2] Moreover, the reopening of a final Board decision in this case is especially burdensome on the parties herein, who have endured nearly *fourteen years* of administrative processing before reaching this point.

TNS submits, however, that no substantial justification for the Panel's refusal to recognize and review the Plurality opinion is presented by the fact that the *lone* dissenting vote in this case was opposed by *two* "defensible" votes rather than three. Indeed, the Panel's revisionism is directly contrary to NLRA Section 3(b), which permits the full Board to act on the majority-vote of as few as three members; *i.e.* a position supported, as in this case, by as little as a 2-1 margin is still a final act of the full Board. *See* 29 U.S.C. § 153(b). Thus even accepting the Panel's view that "given its legal infirmity, the concurring opinion can count for nothing in this case," fully reviewable final Board action still occurred because, of the *three "defensible" votes* cast by the Board – constituting the minimum statutory quorum for final action of the full Board – a majority were cast in favor of dismissing the complaint against TNS. *See FTC v. Flotill Products*, 389 U.S. 179, 185 n.9 (1967) (NLRB may act by simple majority of quorum); *Photo-Sonics, Inc. v. NLRB*, 678 F.2d 121, 122-23 (9th Cir. 1982) (even if only 2 of 3 panel members cast valid votes, decision still binding because quorum of 2 can act for panel).[3]

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[3] The Board's Decision was clearly a fully reviewable order under any of the tests this Court has used to discern final agency action. For example, the parties had exhausted all their administrative remedies with the issuance of the Board's decision. *See Darby v. Cisneros*, ___ U.S. ___, 125 L. Ed. 2d 113, 127 (1993) (agency action reviewable after exhaustion of all mandatory intra-agency appeals). Further, there is no doubt that the Board's Decision definitively determined the rights and obligations of the parties concerning the strike at issue, and that review did not in any sense disrupt any Board proceedings on this matter. *See Bell v. New Jersey*, 461 U.S. 773, 778-80 (1983)

The Panel's decision to remand the case to the Board for a second balloting might have had some analytical basis had it been the Plurality's votes that were not supported by a defensible opinion. In that case, only two defensible votes would have been cast by the Board, leaving a decision and order founded upon less than the quorum majority minimally required by NLRA Section 3(b) for final Board action. This was decidedly not the case, however. What the Panel simply failed to recognize was that only *one* vote was cast in favor of upholding the complaint, and categorically discounting the Concurrence *neither increased nor diminished* the dissent in this regard.[4] Indeed, the Panel never explains how the vote cast by the

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(agency decision reviewable where judicial review not disruptive and decision definitive statement which determines rights of parties). Moreover, this case does not fall under any of the recognized exceptions to the review available under NLRA § 10(f), 29 U.S.C. § 160(f); *i.e.*, this case does not involve a Board order determining an appropriate bargaining unit, a Board order concerning a representation election, a Board order made in connection with certification of a bargaining representative, or a decision of the Board's General Counsel not to pursue an unfair labor practice charge. *See generally* 2 *The Developing Labor Law* at 1878-1880 and 1896-1900 (P. Hardin ed. 3d ed. 1992). Thus, this Court's own authority on final agency action and the plain language of Section 10(f) provide no basis at all for the abridged judicial review accorded the Board's Decision by the Panel herein.

[4] The Panel's treatment of the Concurrence as an effective dissent is all the more ironic in view of the Concurrence's clear disclaimers of any such status: "This is not necessarily to say that I would [disagree with the Plurality and] find that the 'abnormally dangerous' test was met in this case. Nor is it to say that I embrace all the views set forth in the relevant portion of Member Deveney's dissent." *TNS, Inc.*, 309 N.L.R.B. at 1368.

Concurrence, which it characterized as counting "for nothing," may nevertheless be used by the Panel to increase the number of dissenting votes. Whether the Decision and Order is viewed as being a 3-1 ruling or a 2-1 ruling with one defective vote, the Panel simply had no authority under NLRA Sections 3(b) or 10(f) to disregard the finality of the Board's order dismissing the complaint by remanding the case for reballoting.[5]

The Panel downplayed the significance of its reopening the case for a new vote by trying to analogize this result to prior instances in which reviewing courts have returned a case to the Board for a better elaboration of its reasoning. *See, e.g., Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 167-68 (1962) (remand to agency appropriate where agency failed to disclose basis for order). However, the Panel's actions herein are a significant departure from that practice and in open conflict with relevant authority of this Court and circuit courts of appeals.

Under limited circumstances, reviewing courts have remanded a case to the Board to clarify the Board's position on the reasons for a particular decision. The example cited by the Panel in its opinion is *United Food & Commercial Workers v. NLRB,* 880 F.2d 1422 (D.C. Cir. 1989). In

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[5] The inherent illogic in the Panel's holding that the Plurality was not "discernable," 46 F.3d at 84 and 92, is underscored by the fact that, by eliminating one of the two grounds supporting the majority vote, the Panel actually made it crystal clear which rationale should subsequently by relied upon in any future Section 502 cases.

that case, the Board had summarily affirmed an Administrative Law Judge's recommended decision and order without specifying which of three equally plausible legal tests were being relied upon for the decision. In this regard, the Board stated tersely:

> Members Babson and Stephens find that, under any of the views expressed in *Otis Elevator Co.*, 269 NLRB 891 (1984), the Respondent was not obligated to Bargain with the Union over its decision to relocate unit work from its Dubuque plant to its Rochelle plant.

Dubuque Packing Co., Inc., 297 N.L.R.B. 499, n. 1 (1987). On a petition for review, the D.C. Circuit was, not surprisingly, unable to ascertain the Board's legal standard regarding an employer's duty to bargain with its employees over a relocation decision *because none was articulated in the decision and order. See United Food*, 880 F.2d at 1423, 1436. The court was simply left with a Board conclusion that was consistent with some past decisions but inconsistent with others. *See id.* at 1437-38.

None of the considerations supporting remand to the Board in *United Food* and similar cases are present in the case *sub judice*. Most notably, there was no attempt in this case by either the Plurality or the Concurrence to reach a result by summary affirmance or similar artifice designed to avoid precisely indicating the policy underlying the decision. Indeed, unlike *United Food*, the Plurality and the Concurrence provided fully "discernable" and well developed explanations for "which test [each] was relying on . . . [and] how the same result could be reached under each of those tests." *Oil, Chemical and Atomic*

Workers Union, 46 F.3d at 91.[6] Moreover, because the Section 502 applications discussed in the Board's Decision herein were issues of first impression, this is not a situation in which the Board was deviating from prior practice or taking a position without attempting to distinguish what appears to be controlling precedent. *See, e.g., Avecor, Inc. v. NLRB*, 931 F.2d 924, 933 (D.C. Cir. 1991). Thus uncertainties in Board reasoning which have previously supported a remand to the Board are entirely absent from this case. Had this been a situation in which later Board decisions had wavered between the policies espoused in the Plurality and Concurrence and failed to explain coherently the legal standard purportedly being applied, remand to the Board of those decisions *might* have been justified under general remand practice.[7]

Moreover, not only does the Panel's remand represent a serious deviation from remand precedents, but the Panel's approach in this regard cannot be reconciled with

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[6] As alluded to earlier in Note 5, by eliminating one of the two grounds supporting the majority vote, the Panel actually made next to impossible for even the most casual observer not to be able to "discern" which test for Section 502 coverage should be relied upon in any future such cases. In this context, the Panel's characterization of the Board's reasoning as "unfathomable", *id.* at 88, is empty sophistry.

[7] The Panel's instructions to the Board on remand further illustrate its deviation from accepted practice in this area. In *United Food*, the D.C. Circuit urged, but **did not require** the Board "to attempt to articulate a majority-supported statement of the rule that the Board will be applying now and in the future." *Id.* at 1436-37. Here by contrast, the Panel has indicated that it will not recognize as Board action anything short of a majority-supported statement.

the principles recognized by this Court and several other circuits concerning agency reliance on multiple grounds for an action. For example, in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974), this Court reviewed a particular determination of the Interstate Commerce Commission which was based upon two independent grounds. While agreeing with the court below that the first of these two grounds was insufficient to support the Commission's actions on the issue, this Court held that the second reason permitted enforcement of the Commission's order. *Id.* at 287-88. Similarly, in *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1 (1961), this Court held that remand to an administrative agency for further proceedings is necessary only when it is clear that the agency's action would not have been the same without the unsustainable of several grounds for the underlying administrative determination. *Id.* at 67. Clearly, the Panel's remand of this case because of the invalidity of the subsidiary reason of two offered by the Board majority for its action conflicts with the preceding authority. As discussed above, the Plurality's opinion is sufficient standing on its own to support final action of the Board. *See* NLRA Section 3(b), 29 U.S.C § 153(b). Thus the fact that the Panel below invalidated the reasons supporting the Concurrence's position, which were in no way relied upon in the legally defensible Plurality opinion, simply does not warrant the conclusion that remand for further proceedings is at all proper. *See also Communications Workers of America, Local 5008 v. NLRB*, 784 F.2d 847, 850-851 (7th Cir. 1986) (agency action should be sustained if either of two independent grounds is correct; remand

only necessary when Board states single incorrect ground); *NLRB v. Internat'l Union of Operating Engineers, Local 138*, 293 F.2d 187, 199 (2d Cir. 1961) (enforcing portions of cease-and-desist order which had basis independent of invalid reasoning of Board); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 139 (1st Cir. 1953) (remand not required where court satisfied agency's ultimate finding likely to have been arrived at independent of erroneous findings) (*cited with approval in NLRB v. Milgo Industial, Inc.*, 567 F.2d 540, 545-46 (2d Cir. 1977)). TNS submits that the Panel's meager reasoning is simply too slight a foundation to support its drastic and destructive expansion of doctrines permitting limited remand to an agency.

CONCLUSION

In view of the preceding, Supreme Court intervention is necessary in this case under the Court's supervisory jurisdiction to prevent the D.C. Circuit from establishing a particularly pernicious form of remand to an administrative agency. The Panel's partial-review-and-discard approach permits a reviewing court to ignore the statutory mandates for judicial review and jettison without comment legally defensible rationales for an otherwise final agency action. Further, the Panel's remand of a Board decision for a new vote is based upon considerations which are patently insufficient to overcome the strong presumption in favor of review of administrative actions. *Bowen*, 476 U.S. at 670-71. Finally, the Panel's approach to remand conflicts with the practice of this Court and circuit courts of appeals regarding agency

decisions based on multiple, independent grounds. *See Communist Party*, 367 U.S. at 67. The parties on both sides of the this unfair labor practice dispute have awaited a final resolution of the matter for nearly *fourteen years*, only to have the Panel reopen the case under the guise of a standard of judicial review which should not be sanctioned by this Court.

Respectfully submitted,

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APPENDIX

Appearing in the order shown are the following:

46 F.3d 82 ..... App. 1

309 N.L.R.B. 1348 ..... App. 27

806 F.2d 269 ..... App. 171

288 N.L.R.B. 20 ..... App. 187

Judgment of the United States Court of Appeals for the District of Columbia Circuit ..... App. 197

Order on Rehearing ..... App. 199

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

TNS, Inc., Intervenor.

No. 93-1299.

United States Court of Appeals, District of Columbia Circuit.

Argued Nov. 30, 1994.

Decided Feb. 14, 1995.

Union petitioned for review of National Labor Relations Board (NLRB) decision which dismissed unfair labor practice (ULP) complaint against employer based on hiring of permanent replacements for employees engaged in strike which allegedly began as protest over abnormally dangerous working conditions. The Court of appeals, Harry T. Edwards, Chief Judge, held that: (1) workplace health and safety conditions did not have to be "sole cause" of walkout in order for work stoppage to be protected by Labor Management Relations Act (LMRA), and (2) remand to NLRB was required for articulation of majority-supported statement of rule it would apply.

Remanded.

On Petition for Review of an Order of the National Labor Relations Board.

George H. Cohen, argued the cause for petitioner. With him on the briefs were Jeremiah A. Collins and Susan L. Carney.

John H. Fawley, Atty., N.L.R.B., argued the cause for respondent. With him on the brief were Howard E. Perlstein, Deputy Asst. Gen. Counsel, Linda R. Sher, Acting Associate Gen. Counsel, and Aileen A. Armstrong, Deputy Associate Gen. Counsel.

On the brief for intervenor were Robert L. Thompson, William M. Earnest and Nancy F. Reynolds.

Douglas S. McDowell, entered an appearance for amicus curiae Labor Policy Ass'n.

Mona C. Zeiberg, entered an appearance for amicus curiae Chamber of Commerce.

Before: EDWARDS, Chief Judge, GINSBURG and TATEL, Circuit Judges.

Opinion for the Court filed by Chief Judge EDWARDS.

HARRY T. EDWARDS, Chief Judge:

The underlying question in this case is whether employees who engage in a strike, which allegedly began as a protest over "abnormally dangerous" working conditions within the meaning of section 502 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 143 (1988), should be deemed unfair labor practice strikers, in which case the employer would violate the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. § 158(a)(1), (3) (1988), by hiring permanent replacements. In dismissing the complaint at issue, over the dissent of one member, the Board's decision was supported by a two-member plurality opinion and a one-member concurrence. We find, however, that the concurring opinion is founded on a construction of section 502 that is wrong as

a matter of law. We are confronted, then, with a situation in which the result reached by the Board is not supported by defensible opinions from a majority of its members. Because the Board's position on the underlying substantive issue cannot be discerned, we are constrained to remand the case for further proceedings.

The initiating charges in this case were filed in 1981 and 1982 by the Oil, Chemical and Atomic Workers International Union, AFL-CIO ("OCAW" or "Union"), against TNS, Inc., for alleged unfair labor practices. The Union claimed that TNS violated sections 8(a)(1) and (3) of the NLRA 29 U.S.C. § 158(a)(1), (3), when the company permanently replaced a number of bargaining unit employees engaged in a prolonged work stoppage, allegedly precipitated by working conditions perceived to be "abnormally dangerous" by the workers. A divided NLRB dismissed the Union's unfair labor practice charges, ruling that the strike was not a section 502 work stoppage and that, because the employees were economic strikers, TNS had lawfully hired permanent replacements.

Faced for the first time with applying section 502 to the occupational hazards of the nuclear industry, the two-member plurality and the concurring member developed separate tests for demonstrating section 502 coverage in the context of employee exposure to radioactive or toxic substances. The plurality determined under its test that, when the employees ceased working, they did not reasonably believe that working conditions at TNS's plant were "abnormally dangerous" under section 502. The concurrence found section 502 inapplicable because the disputed health and safety conditions, even if abnormally

dangerous, were not the "sole cause" of the work stoppage. *See TNS, Inc.*, 309 N.L.R.B. 1348, 1348-71 (1992) ("NLRB Decision"). The Union now petitions for review of the Board's decision.

Because we conclude that the "sole-cause" test developed by the concurring Board member is clearly an impermissible construction of section 502, we are left with only the plurality's interpretation of that section, which is supported by less than a Board majority. As a result, we are unable to discern the policy of *the Board* in a case in which the entire Board purported to address the underlying issue.[1] We therefore hold that the Board has not adequately articulated its policy in this case and that its decision is thus not properly reviewable in this court.

I. Background

A. *Factual Background*

TNS, Inc., an intervenor in this appeal, operates a plant in Jonesboro, Tennessee. In 1981, when the present dispute arose, TNS produced various forms of ammunition made from depleted uranium ("DU"). Approximately one-hundred employees of TNS were members of the bargaining unit represented by the Union. The collective bargaining agreement between OCAW and TNS was effective through April 30, 1981.

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[1] At the time when this case was decided by the NLRB, there were only four members on the Board.

DU dust particles present in TNS's manufacturing process posed hazards to its employees as both a carcinogenic and chemically toxic material. The inhalation or ingestion of these radioactive particles exposed internal tissues to the cancer risks associated with cumulative, low-level radiation and were a toxic threat to the kidneys. As a result, TNS's plan was subject to the jurisdiction of the United States Nuclear Regulatory Commission ("NRC"). Pursuant to an agreement between the NRC and the State of Tennessee, the Tennessee Division of Radiological Health ("TDRH") was responsible for licensing Tennessee nuclear facilities and for promulgating regulations designed to protect workers from occupational hazards in such facilities.[2] TDRH also inspected subject facilities to ensure compliance with its safety standards and had authority to close a facility through license suspension or revocation. As part of its oversight authority over TDRH, NRC officials periodically accompanied TDRH officials during plan inspections.

In order to comply with TDRH regulations, TNS utilized a physical engineering airborne contaminant control system to eliminate DU dust particles at their source. Because the escape of some radiation into the work environment is inevitable, TDRH also adopted standards for

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[2] The agreement between the NRC and Tennessee was subject to termination or suspension if the NRC determined that such action was necessary to protect the public health and safety or that the state failed to comply with any requirement set forth in the Atomic Energy Act's provision providing for state agreements. *See* 42 U.S.C. § 2021(j)(1) (1988).

the maximum permissible concentration ("MPC") of airborne DU particles. MPC represents the amount of airborne radioactive material beyond which no worker is to be exposed for 40 hours per week for 13 weeks. TDRH regulations required licensees, to the extent practicable, to keep airborne contaminant levels below 25% of MPC. If an employer's engineering system was unable to achieve such levels, TDRH authorized the use of respirators to protect employees. In that event, TDRH required that employers conform to NRC guidelines governing the safe use of respirators.

In September 1979, TDRH began regular, semiannual inspections of the TNS plant. These inspections revealed a number of areas of noncompliance with TDRH regulations at the TNS plant, which TDRH instructed TNS management to rectify. In January 1981, in response to airborne contamination levels at the plant in excess of MPC, as well as a number of employee urine samples with uranium content in excess of TNS's own safety standards, TNS instituted a mandatory program of continuous, full-time respirator use for employees in various sections of the plant. TNS intended to maintain the program until the following August, when it planned to install new ventilating and shielding equipment. Various aspects of the respirator program, however, were carried on in violation of TDRH regulations.

During the winter of 1980/1981, relations between the Union and TNS management became increasingly strained over the health and safety conditions at the plant. As early as October or November of 1980, employees had expressed a desire to strike to protest health and safety conditions. The Union had advised

against such a strike, however, explaining that employees would jeopardize their jobs if they struck before the collective bargaining agreement, which contained a no-strike clause, expired. On March 10, 1981, the Union informed TNS that bargaining unit employees would not return to work after the April 30 expiration of the contract until TNS corrected the safety problems discovered by TDRH's past inspections, as well as any violations discovered during its upcoming April inspection. Also in March, a number of plant employees had engaged in a wildcat strike to protest the respirator program, but the Union persuaded them to return to work.

Negotiations between the Union and TNS over a successor contract were unsuccessful. Agreement could not be reached in a number of areas, including health and safety. On May 1, 1981, bargaining unit employees began a work stoppage at the TNS plant. Subsequent negotiations between TNS and the Union, which primarily focused on health and safety issues, also yielded no agreement. Inspections by TDRH and the federal officials in the summer and fall of 1981, after TNS employees had begun their work stoppage, revealed that employee exposure levels at the TNS plant, while substantially higher than nuclear industry norms, were generally within legal limits. *See* NLRB Decision, 309 N.L.R.B. at 1350-55. After closing down operations for several months, TNS hired permanent replacements for the "striking" workers. This action, as well as TNS's subsequent refusal to bargain with the Union after TNS's replacement employees voted to decertify OCAW as their exclusive representative, prompted the Union to file unfair labor practice charges with the NLRB.

The Union charges to the Board alleged, *inter alia*, that the permanent replacement of workers engaged in a work stoppage under section 502 of the LMRA violated sections 8(a)(1) and 8(a)(3) of the NLRA. Section 502 provides that the good faith "quitting of labor" because of abnormally dangerous working conditions shall not be deemed a "strike" under the Act, 29 U.S.C. § 143. Under established principles of labor law, workers who strike in response to an employer's unfair labor practices normally may not be permanently replaced. *See, e.g., Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 279-84, 76 S.Ct. 349, 356-59, 100 L.Ed.2d 309 (1956). Under the Union's theory of the case, workers who engage in a work stoppage pursuant to section 502 should be deemed the equivalent of unfair labor practice strikers, in which case TNS would have violated the Act by hiring permanent replacements. In August of 1982, the NLRB's General Counsel adopted the Union's theory and brought an unfair labor practice complaint against TNS. *See* Complaint and Notice of Hearing, *reprinted in* Joint Appendix 726.

B. *The Board's Decision*

The hearing before the Administrative Law Judge ("ALJ") began in November 1983 and concluded in April 1985. In a 161-page decision, the ALJ first found that the TNS employees had engaged in their work stoppage pursuant to section 502. The ALJ stated that, under controlling precedent, employees seeking to obtain the protections of section 502 must prove (1) that they believed in good faith that their working conditions were abnormally dangerous and that this belief caused the work stoppage; (2) that ascertainable, objective evidence

supports the reasonableness of the employees' belief; and (3) that the dangers were greater than those which normally existed in the work place and posed a presently existing threat affecting all who engaged in the work stoppage. *See* NLRB Decision, 309 N.L.R.B. at 1435 (reprinting ALJ decision). Concluding that the TNS employees satisfied these standards, the ALJ next found that employees who engage in section 502 work stoppage enjoy "special protections" akin to those provided unfair labor practice strikers. *Id.* at 1454. Accordingly, the ALJ held that TNS's permanent replacement of and refusal to reinstate the bargaining unit employees violated sections 8(a)(1) and (3) of the NLRA.

Called upon for the first time to apply section 502 in the context of occupatior al exposure to low-level radiation, a divided NLRB reversed the ALJ's ruling and dismissed the complaint. The two-member plurality opinion found that, at the time TNS's employees ceased working, they did not reasonably believe that working conditions were abnormally dangerous within the meaning of section 502. *Id.* at 1359-61. Accordingly, the plurality held that the employees were economic strikers and that TNS had lawfully hired permanent replacements. *Id.* at 1365-66.

In construing section 502, the plurality turned to Supreme Court and Board precedent for guidance, because "neither Section 502 nor its legislative history offers any definition of 'abnormally dangerous.' " *Id.* at 1356. Based upon Board precedent and the Supreme Court's decision in *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 386-87, 94 S.Ct. 629, 640-41, 38 L.Ed.2d 583 (1974), the plurality developed a two-part

test for parties "attempting to demonstrate Section 502 coverage in the context of employee exposure . . . to radioactive and/or toxic substances." NLRB Decision, 309 N.L.R.B. at 1357. Noting that section 502 is a limited exception to the rules governing strikes,[3] the plurality initially stated that its test imposes a heavy burden of objective proof on employees. The test requires employees seeking to invoke section 502 to show that they

> reasonably believed, on the basis of objective evidence, *either* (1) that inherently dangerous conditions in the subject workplace had changed significantly for the worse, so as to impose a substantial threat of imminent danger if exposure were continued at the time the employees began to withhold their services, *or* (2) that the cumulative effects of exposure to those substances had reached the point at which any further exposure would pose an unacceptable risk of future injury to employees.

Id. at 1357-58 (footnote omitted).

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[3] Section 502 provides in relevant part:

> [N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this [Act].

29 U.S.C. § 143. The Supreme Court has stated that "[t]his section provides a limited exception to an express or implied no-strike obligation." *Gateway Coal*, 414 U.S. at 385, 94 S.Ct. at 640.

The plurality explained that the first part of its test reflects the rationale that, absent the emergence of circumstances that change the character of the danger normally faced by employees, inherently dangerous working conditions do not become abnormally dangerous merely because employees no longer wish to accept those same dangers. *See id.* at 1358 (citing *Anaconda Aluminum Co.*, 197 N.L.R.B. 336, 344 (1972)). The plurality further stated that, in accord with Board precedent, "the appropriate benchmark of normalcy for evaluating the claim of abnormal danger is set by the prevailing conditions at the TNS plant, rather than by conditions in the nuclear industry at large or in the industrial subgroup of employees working with DU." *Id.* (internal quotations omitted). The plurality then concluded that the first part of its test had not been satisfied in this case because, "[i]n the few months preceding the work stoppage, there were no significant new . . . circumstances changing the character of the prevailing danger involved in working at the TNS plant." *Id.* In reaching that conclusion, the plurality noted that both the Union and employees had complained about health and safety conditions at the plant for several months and yet had not walked off the job. The plurality found that these actions were inconsistent with a reasonable belief that abnormally dangerous working conditions existed at the plant. *See id.* at 1359.

The second part of its test, the plurality explained, was intended to allow for the possibility that employee exposure to radioactive substances may build over time to a point where further exposure would pose unacceptable health

risks, notwithstanding the fact that no material change in working conditions may have occurred.[4] *See id.* at 1358. In determining whether that threshold has been reached, the plurality stated that it would give "substantial weight" to the actions and assessments of the agencies "charged-, . . . with the responsibility for monitoring radiation hazards in plants such as TNS." *Id.* at 1360. Thus, based largely on the fact that TDRH and the NRC had never indicated that conditions at the TNS plant were so unsafe as to require removal of employees at the time of the walkout, or even considered taking such action, and that there was no evidence that those agencies had failed to carry out their regulatory responsibilities in an appropriate manner, the plurality found that the danger threshold of the second part of its test had not been met. *See id.* at 1360-61.

One Board member concurred in the judgment dismissing the Union's complaint, but on grounds that were significantly divorced from the plurality opinion. In fact, the concurrence strongly criticized the plurality's test, claiming that it imposed "unrealistic barriers" to showing abnormal danger in the context of occupational exposure to unsafe levels of radiation. *Id.* at 1368. The concurrence agreed with the plurality that the employees' walkout was not protected by section 502, but on the narrower ground that health and safety conditions at the TNS

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[4] In a footnote, the plurality also "allow[ed] for the possibility of exceptional circumstances in which the place of employment presents abnormally dangerous conditions that are evident virtually from the time that employees begin work there." NLRB Decisions, 309 N.L.R.B. at 1358 n. 36.

plant, even assuming that they were abnormally dangerous, were not the "sole cause" of the work stoppage. *See id.* In developing a "sole-cause" test, the concurrence relied on both the language of section 502 and a statement in *Gateway Coal.* The concurrence first noted that, in order to fall within the compass of section 502, a work stoppage must occur "because of" abnormally dangerous working conditions. 29 U.S.C. § 143. Thus, the concurrence stated, there must be a causal connection between the abnormally dangerous conditions and the work stoppage. *See* NLRB Decision, 309 N.L.R.B. at 1368. The concurrence then pointed to the Supreme Court's statement in *Gateway Coal* that "a work stoppage called solely to protect employees from immediate danger is authorized by § 502." 414 U.S. at 385, 94 S.Ct. at 640. From this statement, the concurrence concluded that a work stoppage is covered by section 502 only if abnormally dangerous working conditions are the "sole cause" of the walkout. Finding that the work stoppage was caused, "at least in part, by a desire to achieve a satisfactory collective bargaining agreement, rather than solely by a reaction to abnormally dangerous conditions in the plant," NLRB Decision, 309 N.L.R.B. at 1370, the concurrence concluded that section 502 did not apply in this case.

Because both the plurality and the concurrence found that section 502 did not apply in this case, neither opinion reached the issue of whether employees who stop working pursuant to section 502 should be protected from permanent replacement. Member Devaney, in dissent, would have sustained the Union's complaint in its entirety. *See id.* at 1371-88.

II. Analysis

On petition for review, the Union raises a number of challenges to the Board's decision. We need not reach most of these issues, however, for we find one to be dispositive. Because we find that the concurring member's "sole-cause" test is wrong as a matter of law, we are left with a plurality test supported by only two of four Board members. Normally, the Board's construction of the Act is subject to deferential review under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 2781-83, 81 L.Ed.2d 694 (1984); the problem here is that the *Board*'s position is unfathomable. A majority of the Board agreed on a result, but the plurality, concurring, and dissenting opinions have no other common ground (and the concurring opinion is patently meritless). In this circumstance, where the result hinges on the Board's definition of the underlying legal right at issue, we will not defer to the Board's disposition because we cannot comprehend a basis for the result reached.

A. *Applicable Legal Principles*

As the Supreme Court has repeatedly emphasized, "[t]he function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 431, 98 S.Ct. 2423, 2434, 57 L.Ed.2d 313 (1978) (internal quotations omitted); *see also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786, 110 S.Ct.

1542, 1549, 108 L.Ed.2d 801 (1990) ("This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy."); *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1249 (D.C.Cir.1994) ("It is up to the Board, not the courts, to make labor policy."). Therefore, courts have accorded considerable deference to policy judgments of the Board. *See Curtin Matheson*, 494 U.S. at 786, 110 S.Ct. at 1549; *Pittsburgh Press Co. v. NLRB*, 977 F.2d 652, 662 (D.C.Cir.1992) ("We are mindful of the deference we owe the Board's expertise and judgment."). And where a Board policy rests on a construction of an ambiguous provision in the Act, we must uphold that construction so long as it is "reasonable." *Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2781-83; *accord Hammontree v. NLRB*, 925 F.2d 1486, 1491 (D.C.Cir.1991) (*en banc*).

Under the *Chevron* doctrine, "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." 467 U.S. at 843, 104 S.Ct. at 2782 (internal quotations omitted); *see also National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C.Cir.) ("When Congress leaves gaps . . . , either explicitly by authorizing the agency to adopt implementing regulations, or implicitly by enacting an ambiguously worded provision that the agency must interpret it has explicitly or implicitly delegated to the agency the power to fill those gaps. That delegation requires the courts to defer to an agency's decision about how to exercise its power."), *cert. denied*, 484 U.S. 869, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987); *Investment Co. Inst. v. Conover*, 790 F.2d

925, 935 (D.C.Cir.) ("The overriding principle is that as long as Congress has no clearly discernable intent on the point in question, it is the agency which is vested with primary responsibility for interpreting the statute. *Chevron* teaches that Congress may delegate interpretative authority implicitly – by failing to legislate in sufficient detail as to resolve a particular question of interpretation."), *cert. denied*, 479 U.S. 939, 107 S.Ct. 421, 93 L.Ed.2d 372 (1986).

The adoption of this unitary principle in *Chevron* represented a dramatic change in the law of judicial review of federal agency decisionmaking. Prior to *Chevron*, courts did not adhere to any one standard in reviewing agency constructions of the statutes they administered. *See* Mark Seidenfeld, A SYNCOPATED *CHEVRON*: EMPHASIZING REASONED DECISIONMAKING IN REVIEWING AGENCY INTERPRETATIONS OF STATUTES, 73 TEX.L.REV. 83, 93 (1994) (referring to pre-*Chevron* doctrine as "schizophrenic"). As Judge Friendly wrote in 1976:

> We think it is time to recognize . . . that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for the case at hand. Leading cases support[ ] the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis. . . . However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.

Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 49 (2d Cir.1976) (footnote omitted), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). Indeed, as late as 1984 (the year *Chevron* was decided), this court noted that the case law

> has not crystallized around a single doctrinal formulation which captures the extent to which courts should defer to agency interpretations of law. Instead, two opposing platitudes exert countervailing gravitational pulls on the law. At one pole stands the maxim that courts should defer to reasonable agency interpretive positions. . . . Pulling in the other direction is the principle that courts remain the final arbiters of statutory meaning. . . .

Natural Resources Defense Council v. EPA, 725 F.2d 761, 767 (D.C.Cir.1984) (internal quotations and citations omitted).

In deciding whether to defer to agency determinations or to substitute their own judgment for that of the agency, pre-*Chevron* courts frequently looked to the relative competence of the agency and the court in deciding the matter in question. For example, courts that accepted reasonable agency interpretations often referred to the agency's expertise, its familiarity with the history and purposes of the legislation at issue, and its practical knowledge of what will best effectuate the purposes of the statute. *See, e.g., NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31, 64 S.Ct. 851, 860-61, 88 L.Ed. 1170 (1944); *Process Gas Consumers Group v. United States Dep't of Agric*, 694 F.2d 778, 791-92 (D.C.Cir.1982) (*en banc*), *cert. denied*, 461 U.S. 905, 103 S.Ct. 1874, 76 L.Ed.2d 807 (1983). On the

other hand, when courts substituted their own interpretations for those of the agencies, they usually did so on the ground that the courts are the final arbiters in matters of statutory interpretation. *See, e.g., Barlow v. Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 838, 25 L.Ed.2d 192 (1970); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492-93, 67 S.Ct. 789, 793-94, 91 L.Ed. 1040 (1947).

In *Chevron*, the Court opted in favor of the line of cases holding that, absent *plain meaning* in a statute, reviewing courts must defer to reasonable agency interpretations of the statutes they are charged with administering. This is not to say that any claimed ambiguity in a statute requires a court to accept any agency action premised on that ambiguity. As we have noted:

> [D]eference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied "delegation of authority to the agency." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). . . .
>
> To suggest, as the Board effectively does, that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power . . . , is both flatly unfaithful to the principles of administrative law . . . and refuted by precedent. *See, e.g., Natural Resources Defense Council v. Reilly*, 983 F.2d 259, 266 (D.C.Cir.1993) (" '[I]t is only legislative *intent to delegate* such authority that entitles an agency to advance its own statutory construction for review under the deferential second prong of *Chevron*.' ") (quoting *Kansas City v. Department of Housing & Urban Dev.*, 923

> F.2d 188, 191-92 (D.C.Cir.1991)) (emphasis added). Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.

Railway Labor Executives' Ass'n v. National Mediation Bd., 29 F.3d 655, 671 (D.C.Cir.1994). In a case such as this one, however, there can be no doubt that Congress delegated authority to the Board to construe provisions of the NLRA, especially those implicating alleged unfair labor practices. The only question here is whether the Board has articulated a defensible policy.

"Judicial deference under *Chevron* to an agency's interpretation . . . cannot occur in a vacuum." *Leeco, Inc. v. Hays*, 965 F.2d 1081, 1085 (D.C.Cir.1992). In order for the reviewing court properly to perform its task under *Chevron*, it must be able to discern the rationale underlying an agency's construction of the statute. *See Acme Die Casting v. NLRB*, 26 F.3d 162, 166 (D.C.Cir.1994); *Leeco*, 965 F.2d at 1085 ("In the absence of any explanation justifying [the agency's position] as within the purposes of the Act . . . , we are unable to sustain the Commission's decision as reasonably defensible.") (internal quotations omitted); *City of Kansas City v. HUD*, 923 F.2d 188, 192 (D.C.Cir.1991) ("[W]here the agency's administrator has failed to provide . . . a reasonable construction to which we can defer, we must remand to the agency for consideration of the statutory question in the first instance."); *International Longshoremen's Ass'n v. National Mediation Bd.*, 870 F.2d 733, 736 (D.C.Cir.1989) (agency's failure to

articulate basis for its decisions "frustrate[s] effective judicial review" because court "cannot defer to what [it] cannot perceive") (internal quotations omitted); *see also United Food & Commercial Workers Int'l Union v. NLRB*, 880 F.2d 1422, 1436 (D.C.Cir.1989) ("[T]he [NLRB] must accept responsibility for clarifying and identifying the standards that are guiding its decisions."). We insist upon such an articulation by *the agency* "to avoid 'propel[ing] the court into the domain which Congress has set aside exclusively for the administrative agency.' " *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947)).

Our assessment of an agency's statutory construction becomes more complicated where, as here, we are confronted with a Board ruling that is supported by more than one rationale. For example, in *United Food and Commercial Workers*, 880 F.2d at 1436-37, the NLRB had ruled without explanation that an employer's refusal to bargain over a plant relocation was lawful under any one of three separate tests for determining whether such a decision was a mandatory subject of bargaining, each of which had been articulated in a previous Board decision. *Id.* Notwithstanding the reasonableness of the three separate tests, the court held that the Board's failure to articulate which test it was relying on, or, at a minimum, to explain how the same result could be reached under each of those tests, did not reflect the reasoned decisionmaking required of administrative agencies. *Id.* We stated:

> As disputes arise, such as the current one, that force the Board to chart a course in the more

> ambiguous or disputed territory of . . . [a legal] test, the Board must accept responsibility for clarifying and identifying the standards that are guiding its decisions.

Id. at 1436. While not requiring it, we "urge[d] the Board . . . on remand . . . to attempt to articulate a majority-supported statement of the rule that the Board will be applying now and in the future." *Id.* at 1436-37.

The problem in the instant case is even more difficult than the situation that the court faced in *United Food and Commercial Workers,* for here the result reached by the Board is not supported by reasonable opinions from a majority of its members.[5] In such a circumstance, we are constrained to return this case to the Board to allow for the articulation of a legal test upon which a judgment may rest.

B. *The Legal Flaws in the Concurrence's "Sole-Cause" Test*

As already noted, the dilemma posed in this case arises because the concurring opinion is founded on a construction of section 502 that is wrong as a matter of law. The concurrence held that a work stoppage is not protected by section 502 unless workplace health and safety conditions, even if abnormally dangerous, are the

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[5] In a somewhat analogous situation, the Board itself has noted: "In [a prior case] the Board plurality opinion rejected this doctrine, but there was no holding on the issue because the vote was split 2-2 on this point." *Mowhawk Liqueur Co.,* 300 N.L.R.B. 1075, 1075-76 n.3 (1990), *enforced sub nom. General Indus. Employees Union, Local 42 v. NLRB,* 951 F.2d 1308 (D.C.Cir.1991).

"sole cause" of the walkout. NLRB Decision, 309 N.L.R.B. at 1368.

The concurrence's sole-cause test is purportedly drawn from language in the Supreme Court's *Gateway Coal* decision, which stated that "a work stoppage called solely to protect employees from immediate danger is authorized by § 502." But the concurrence reads too much into the Court's language. To say that a strike called "solely to protect employees from immediate danger is authorized by § 502," is not the same as saying that "a strike is not protected by § 502 unless the sole reason for it is to protect employees from immediate danger." The fatal problem with the concurrence's reliance on the cited language from *Gateway Coal* is that the concurring opinion completely fails to acknowledge the different contexts involved in *Gateway Coal* and this case. *Gateway Coal* involved an employee strike that occurred while an implied no-strike obligation was still in effect. 414 U.S. at 373, 380-87, 94 S.Ct. at 634-35, 638-41 (finding that contractual agreement to submit disagreements to binding arbitration included disputes over safety and thus gave rise to implied obligation not to strike over such disputes). Here, however, the bargaining unit employees ceased working after the collective bargaining agreement had expired, so there was no no-strike obligation in effect. The sole-cause test cannot reasonably be applied in both of these situations, for this would lead to absurd results.

For example, in a situation where a union contract has expired and employees may lawfully engage in an economic strike, the sole-cause test would have the effect of precluding application of section 502 where employees

strike because they want higher wages *and* because fires break out at their work stations whenever they attempt to operate their equipment. Because it could always be said that the employees' concern for their safety was mixed with desires for a better economic package, the sole-cause test would preclude such a walkout from the protections of section 502. This is a ridiculous result, however, because there could be no doubt in this hypothetical that the employees were protesting abnormally dangerous conditions – that they also desired better wages is irrelevant.

The concurrence states that if the union simply informs the employer that the work stoppage will terminate upon the correction of the abnormally dangerous conditions, this would satisfy the sole-cause test "at least primate facie." *See* NLRB Decision, 311 N.L.R.B. at 1369. However, the concurrence's position is hopelessly shortsighted: the federal labor laws give employees the right to engage in lawful economic strikes upon expiration of the parties' agreement. *See* 29 U.S.C. § 157 (1988); *see generally NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-18, 82 S.Ct. 1099, 1102-04, 8 L.Ed.2d 298 (1962). Employees cannot be made to promise to return to work from a lawful economic strike in order to prove the legitimacy of their concern over the unsafe conditions. Accordingly, in cases such as this, the sole-cause rule would clearly achieve results contrary to federal labor policy.[6]

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[6] Of course, since it is normally impermissible for employees to strike or cease working while a no-strike obligation is in effect, *see Mastro Plastics*, 350 U.S. at 280, 76 S.Ct. at

C. *Legal Principles Applied to this Case*

With only the plurality opinion remaining to justify the Board's result in this case, we are left with a position, rational or not, supported by only two of four Board members. It is thus clear that *the Board* as a whole has failed to articulate an appropriate legal standard for the resolution of this case. Because we cannot discern a Board position, we are compelled to remand the case for reconsideration. The Board must "articulate a majority-supported statement of the rule that [it] will be applying now and in the future," *United Food & Commercial Workers*, 880 F.2d at 1436-37, in determining the applicability of section 502 in the context of occupational exposure to low-level radiation.

356-57, the concurrence's concern about mixed motives in such situations would be more appropriate. Even here, however, the sole-cause rule could lead to anomalous results. In *Mastro Plastics*, 350 U.S. at 279-84, 76 S.Ct. at 356-59, the Supreme Court suggested that, at least in some circumstances, a general no-strike clause may not waive the employees' right to strike in response to unfair labor practices committed by the employer. Notwithstanding *Mastro Plastics*, the sole-cause test would have the effect of precluding section 502 coverage where employees walked off the job in response to egregious employer unfair labor practices *and* abnormally dangerous working conditions. As in the context where the union contract has expired, however, this would be an absurd result, for the employees certainly walked off the job because of abnormally dangerous working conditions, regardless of whether the employer had also committed unfair labor practices. Thus, the sole-cause rule might make sense only where a walk-out occurred while a no-strike obligation was in effect *and* in the absence of employer unfair labor practices (of the sort contemplated by *Mastro Plastics*), which was the case in *Gateway Coal*.

Board counsel objects to a remand, arguing that the agency's decision in this case is entitled to deference because the judgment dismissing the Union's complaint was supported by a majority of Board members. This contention is well wide of the mark, however, for, given its legal infirmity, the concurring opinion can count for nothing in this case. Lest we are misunderstood, we should state the obvious: Our decision in this case does not deprecate, but rather vindicates, the administrative process, as well as the Board's primary authority and responsibility for making federal labor policy. When, as here, the agency has failed to take a position, we do not substitute our judgment for that of the agency or attempt to surmise what the agency's position might have been. *See Burlington Truck Lines*, 371 U.S. at 169, 83 S.Ct. at 246 ("[T]he purpose of th[is] rule is to avoid propelling the court into the domain which Congress has set aside exclusively for the administrative agency.") (internal quotations and alterations omitted). Rather, we insist that *the agency*, to which Congress has delegated principal policymaking authority, choose and clearly articulate its rule. *See Acme Die Casting*, 26 F.3d at 166 (while reviewing court "will be bound [under *Chevron*] to accept any reasonable rule that the Board selects . . . [, it is] *the Board* [which] must select the rule") (emphasis added); *City of Kansas City*, 923 F.2d at 192 (where agency has offered no interpretation of statutory provision, agency not entitled to deference on review, because "[d]eference under *Chevron* . . . can be accorded only to a judgment of the agency itself").

III. Conclusion

This case is hereby remanded to the Board for further proceedings consistent with this opinion.

So ordered.

TNS, Inc. *and* Oil, Chemical and Atomic Workers International Union, AFL-CIO. Cases 10-CA-17709 and 10-CA-18785

December 23, 1992

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

The principal issues in this case[1] involve application of Section 502 of the Act in determining whether the Respondent violated Section 8(a)(3) and (1) by permanently replacing employees who engaged in a work stoppage which the General Counsel asserts was caused by the existence of "abnormally dangerous" working conditions. Other issues are: (1) Did the Respondent violate Section 8(a)(3) by failing to reopen its penetrator shop operations at the conclusion of the work stoppage? (2) Did the Respondent violate Section 8(a)(1) in making statements about the seniority of employees reinstated after the work stoppage? (3) Did the Respondent violate Section 8(a)(5) by withdrawing recognition of the Union as the unit employees' representative? The judge found each of the unfair labor practices alleged in the complaint.

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[1] On July 31, 1987, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and the Charging Party filed answering briefs. The United States, on behalf of the Department of Energy and Nuclear Regulatory Commission, filed an amicus curiae brief as did the U.S. Chamber of Commerce, the American Nuclear Insurers (ANI), the Mutual Atomic Energy Liability Underwriters (MAELU), Lapp Inc., and Lauritson S. Taylor, an individual.

The Board has considered the decision and the record[2] in light of the exceptions and briefs[3] and has

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[2] The hearing in this case took place between November 1983 and April 1985 consuming a total of 67 hearing days and consisting of 12,630 pages of testimony and hundreds of exhibits.

Subsequent to the hearing a panel of the Board initially deferred to private non-Board settlement agreements submitted on behalf of 56 alleged discriminatees and dismissed portions of the complaint as to them. The Board's Order approving the settlement agreements was reversed by the United States Court of Appeals for the District of Columbia. On remand from the court, the Board vacated its prior Order approving the settlement agreements and reinstated the complaint allegations pertaining to the 56 alleged discriminatees. See *TNS, Inc.*, 288 NLRB 20 (1988).

[3] The Respondent's brief is 413 pages, the Charging Party's answer brief is 311 pages, the General Counsel's answer brief is 128 pages, the combined brief of amici ANI and MAELU is 87 pages, and the briefs of amici United States and the Chamber of Commerce are 13 and 34 pages respectively.

The General Counsel and the Charging Party filed motions to reject the Respondent's exceptions and brief. They allege that the Respondent failed to comply with Sec. 102.46(b) and (c) of the Board's Rules and Regulations. Specifically, they contend that the exceptions fail to designate by precise page citation the portions of the record relied on and that some exceptions improperly contain argument which, together with the supporting brief, also constitute a violation of the Board's allowable page limit for argument. With respect to the Respondent's brief, the General Counsel and the Charging Party contend that it does not contain a specification of questions involved or supporting fact and law relating to each exception and that the argument section fails to make reference to specific exceptions.

We agree that certain of the Respondent's exceptions inappropriately include argument. Accordingly, we shall grant the motions in part and disregard any argument found in the exceptions. In all other respects, the motions are denied as the

decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with the Decision and Order.

For the reasons set forth in section I of this decision, we reverse the judge and find that the General Counsel has failed to prove that abnormally dangerous working conditions existed at the time the employees walked out. Consequently, regardless whether or not an employer may permanently replace employees engaged in a Section 502 work stoppage (an issue we do not decide), the Respondent did not commit an unfair labor practice by permanently replacing the employees in this case. Furthermore, for the reasons set forth in sections II, III, and IV below, we reverse the judge's other unfair labor practice findings and dismiss the complaint in its entirety.

Respondent's exceptions and supporting brief, although not conforming in all particulars with Secs. 102.46(b) and (c), are not so deficient as to warrant their rejection.

The General Counsel and the Charging Party also filed motions to reject the amicus brief filed by Lauriston S. Taylor, and the Charging Party filed a separate motion to reject the amicus brief of Lapp Inc. on grounds, inter alia, that the briefs attempt to add evidence to the record well after the trial proceedings have closed. We find merit in this contention and, accordingly, we grant the motions to reject the briefs.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

I. THE ALLEGED SECTION 502 WORK STOPPAGE

A. *Factual Findings*

1. The Respondent's business and the nuclear safety regulatory framework

The Respondent, TNS, is a corporation which, at the time of the instant dispute, was engaged in the manufacture of radioactive depleted uranium (DU) metal products at a plant in Jonesboro, Tennessee. Manufacturing operations took place in two buildings – the foundry and the penetrator shop. Workers in the foundry manufactured uranium ingots known as "derbies." Workers in the penetrator shop manufactured the "GAU-8 penetrator core."

The safety of the Respondent's use of radioactive materials in the manufacturing process is subject to the jurisdiction by the United States Nuclear Regulatory Commission (NRC). The NRC has entered into agreement with the State of Tennessee for the latter to exercise primary regulatory responsibility over facilities within that State, including the TNS plant, in a manner consistent with the Atomic Energy Act. The Tennessee Division of Radiological Health (TDRH) is the state agency responsible for the protection of workers from occupational radioactive hazards through the promulgation of regulations complying with Federal standards, the licensing of facilities using radioactive materials, and the inspection of facilities to assure compliance with safety standards.

In oversight of TDRH's compliance with the Federal radiation protection program, NRC officials periodically accompanied TDRH officials during plant inspections.

The NRC was authorized to terminate or suspend all or part of its agreement with Tennessee if, in its judgment, such action was necessary to protect the public health and safety, or if Tennessee failed to comply with any requirement set forth in the Federal statute providing for state agreements.[4] The NRC was also authorized to suspend temporarily all or part of its agreement with Tennessee if an emergency situation arose with respect to any radioactive material that created danger requiring immediate action, and if Tennessee failed to take the necessary steps within a reasonable time to contain or eliminate the danger.[5]

TDRH had the police authority to effect a shutdown of a subject facility through license suspension or revocation. Following each plant inspection, TDRH prepared an internal agency report and issued a letter to the licensee citing any observed violations and directing corrective action. Failure to follow such directives authorized TDRH to seek a "Commissioner's Order" to obtain compliance. Failure to comply with a Commissioner's Order empowered TDRH to initiate a judicial proceeding to close a facility.[6]

DU poses hazards to TNS employees as both a carcinogenic and a chemically toxic material. The inhalation or ingestion of radioactive DU-dust particles exposes internal tissues to the cancer risks associated with cumulative,

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[4] 42 U.S.C. § 2021(j)(1).

[5] 42 U.S.C. § 2021(j)(2).

[6] TDRH Official Charles West testified that it would be "very, very difficult" to seek license revocation.

low-level alpha radiation. In addition, dust particles of DU, an extremely dense and heavy metal, represent a toxic threat to the kidneys.

To protect employees from the potential hazards of exposure to DU, TDRH has adopted the dose limits set by the NRC. Whole body external exposures should not exceed 1.25 rems[7] per calendar quarter or 5 rems per year. Internal lung exposure limits are 15 rems per year. TNS employees wear thermoluminescent dosimeters (TLD badges) to measure external exposures. Internal exposure levels are measured by "invivo" lung scans administered semiannually to employees.

The NRC had no official regulation governing the allowable amount of DU in the kidney. It published a proposed regulatory "guideline" (Reg. Guide 8.22) for urine bioassays in uranium mills. This proposed guideline[8] stated that kidney damage may occur if any single urine sample was greater than 130 micrograms of uranium per liter of urine (ug/l), or if four or more consecutive samples were greater than 30 ug/l. It set "notice" and "action" levels at 15 ug/l and 30 ug/l respectively.[9]

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[7] A rem is defined in the Federal regulations as a unit for measuring a dose of radiation received by an individual and which takes into account differing biological effects of different types of radiation. 10 CFR § 20.4(c).

[8] Reg. Guide 8.22 was published for notice and comment in 1978 but was never issued in final form.

[9] A notice level served the purpose of an alarm system for investigating the causes of elevated urine samples so that corrective action could be taken. Urine samples reaching action levels result in the removal of an employee from his work area pending subsequent urinalysis readings below the notice level.

The Respondent collected bimonthly urine specimens from its employees. In evaluating the urine bioassay data, it did not follow the legally nonbinding Reg. Guide 8.22. Instead, it applied, and TDRH approved, alternate guidelines published by the U.S. Army's "DARCOM" Manual, which specifically addressed exposures to DU. The DARCOM guidelines set respective notice and action levels at 50 and 100 ug/l. They did not, however, contain any danger level analogous to the 130 ug/l level set forth in Reg. Guide 8.22.

In addition to the foregoing regulations and guidelines, TDRH mandated that subject employers adhere to the concept that all exposures to DU should be kept "as low as is reasonably achievable." This philosophy, known as the ALARA doctrine, operates on the principle that if an exposure level below the legal limit can be achieved without the expenditure of unreasonable funds, such levels should be adopted and maintained.[10]

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[10] As defined in the Federal regulations, ALARA "means as low as is reasonably achievable taking into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety, and other social and socioeconomic considerations, and in relation to the utilization of atomic energy in the public interest." 10 CFR § 20.1(c).

The ALARA concept is illustrative of a debate about whether there is an acceptable level of occupational exposure to low-level radiation, such as DU emits. Considerable expert testimony has been entered into the record in this case by proponents of opposing theories: one set of witnesses holds that there is no "safe" threshold level of exposure; the other set of witnesses holds that there can be a safe threshold level. Although scientific in its origin and methodology, this debate has found a second forum in tort litigation. Compare *Allen v. U.S.*, 588 F.Supp. 247 (D. Utah 1984), revd. 816 F.2d 1417 (8th Cir. 1987),

Elimination of DU dust particles at their source is the best defense against exposure to its hazards. Consequently, TDRH mandated a physical engineering airborne contaminant control system using equipment shields, barrier seals, and ventilation. Acknowledging that some radiation escape into the working environment is inevitable, TDRH followed the NRC in adopting standards set by the National Commission on Radiological Protection (NCRP) for the maximum permissible concentration (MPC) of airborne DU particles. MPC is defined as the amount of airborne radioactive material beyond which no worker is to be exposed for 40 hours per week for 13 weeks.[11] To monitor air quality, the Respondent utilized various types of air samplers throughout the plant.

In the event that engineering controls became impracticable in achieving MPC, TDRH regulations authorized the use of respiratory protection, provided that such use conformed with NRC Regulatory Guide 8.15 and its supplemental manual on respiratory protection, NUREG 0041 (NUREG). These regulations required: a written policy statement on respirator usage; selection of respirators with a protection factor (PF) greater than MPC; medical approval of and fit testing for employees wearing respirators; procedures for the proper selection, supervision, and training of personnel in respirator use; a program ensuring proper cleaning, maintenance, and storage of respirators; and notice to employees that they

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cert. denied 484 U.S. 1004 (1988), with *Johnston v. U.S.*, 597 F.Supp. 374 (D. Kans. 1984).

[11] 10 CFR § 20.103(a)(1).

are free to leave their work station if their respirators malfunction or they experience discomfort.

Chapter 2 of the NUREG manual set forth the controlling standard for durational limits on the use of respirators. For operations like the Respondent's, the manual stated that "when engineering controls are not feasible or cannot be applied, the use of respiratory protective devices may be appropriate . . . [not] as a substitute for practicable engineering controls . . . [but] while engineering controls are being instituted or evaluated." Specifically, the manual states that while the "periods of time respirators are worn continuously and the overall durations of use should each be kept to a minimum . . . it is difficult to realistically assign specific time limits on respirator use because of wide variations on job requirements and in the physical capacities and psychological attitudes of individuals." Nonetheless, "such factors must be taken into account in establishing a respirator program."

2. The events at TNS

The Union has represented the Respondent's employees there since 1978. The parties negotiated a 3-year collective-bargaining agreement effective from May 1, 1978, through April 30, 1981. This contract included a brief health and safety clause, with a provision for monthly labor-management health and safety tours, and the posting on employee bulletin boards reports by union members of potential hazards needing corrective action.

In September 1979, TDRH began regular semiannual inspections of the TNS plant. The first inspection resulted in a November 12, 1979 letter finding that the Respondent's "activities were not conducted in full compliance with 'State Regulations for Protection Against Radiation' and certain conditions of your License" including, inter alia:

> 1. The radiation safety program as referenced in . . . our [state] license, did not appear to be administered adequately to provide the maximum degree of protection for your employees.
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> . . . .
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> 4. Personnel training in precautions or procedures to minimize radiation exposure was inadequate, contrary to [state regulations].
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> . . . .
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> 9. An individual was exposed to radiation in excess of applicable limits contrary to . . . [state regulations].
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> . . . .
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> 11. Proper notification was not made to the Department concerning the exposure of personnel to radiation in excess of applicable limits, contrary to [state regulations].
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> 12. Proper notification was not made to personnel exposed to radiation in excess of applicable limits, contrary to [state regulations].
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> . . . .
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> 15. Adequate surveys for evaluating radiation hazards were not being conducted, contrary to [state regulations].

The inspection letter listed 16 violations in all and concluded with the admonition that "it appears that a severe laxity in your facility's radiation safety program has developed. Immediate attention should be given to the upgrading of this program."

On April 10, 1980, TDRH agents visited the TNS plant to investigate a complaint about one employee's alleged overexposure to airborne radioactive contaminants. An internal TDRH memorandum about this visit stated: "There appeared to be conditions that such an exposure of this type could have occurred." A September 17, 1980, TDRH letter cited the Respondent for inadequate training of employees and deficiencies in both urine bioassay and air quality control procedures.

In the meanwhile, TDRH conducted another semiannual inspection in May 1980. On August 25, 1980, the state agency cited 11 specific areas of noncompliance. Six of these had also been noted after the September 1979 inspection. In addition, TDRH noted, inter alia, that "Radiation and contamination levels in unrestricted areas were in excess of the limits for uncontrolled areas."

As part of NRC's oversight function, NRC Official Edgar Ashley accompanied TDRH personnel during its next inspection of the Respondent in November 1980. At the conclusion of the inspection, Ashley and TDRH Inspector Johnny Graves met with TNS officials. According to Ashley's notes of the meeting, Graves discussed an assortment of "main items" of noncompliance from past TDRH inspections and "what had been done to correct them." Graves further discussed new items of noncompliance, such as the reduction in managerial rank of the

TNS radiation safety officer, the absence of health staff during the night shift, an ALARA concept in need of strengthening, and the failure to post radiation warning symbols at appropriate plant entrances. These and other deficiencies were officially noted in an enforcement letter sent by TDRH to the Respondent on January 29, 1981.[12] The letter concluded that "several of the items of non-compliance indicated above have been called to your attention in letters reflecting the result of previous inspections. It appears that sufficient effort is not being exerted to prevent the recurrence of these items." Nevertheless, in the "Summary" section of its internal report of this inspection, TDRH indicated that the Respondent's "radiation safety program is making progress."

Several significant events took place at the TNS plant prior to the next TDRH inspection. In January, the Respondent implemented a mandatory program of continuous, full-time respirator use in various sections of the foundry and penetrator shop in response to excessive MPC levels, which admittedly were not being controlled by the Respondent's engineering processes. The respirator program was intended to continue until approximately August, when new ventilating and shielding equipment, which had been ordered, would be installed.[13] By the winter of 1981, Local Union President John Bettis had increased the Union's emphasis on health

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[12] All dates hereafter are in 1981, unless otherwise indicated.

[13] Thus, contrary to the dissent, the respirator program was not intended to be of indefinite duration.

and safety concerns and had revived the neglected contractual procedure for monthly joint labor-management tours and the posting of reports of potential hazards identified by union members. The items listed in these reports were, for the most part, ordinary industrial safety infractions unrelated to DU hazards, such as faulty electrical wiring, blocked fire lanes, leak in roof, etc. Complaints related to radiation safety consistently referred to malfunctioning or ineffective shielding and ventilation equipment, excessive dust, and unsanitary conditions in the employee clothing change rooms.

March 9 and 10 marked the last TDRH inspection visit prior to the employee walkout on May 1. This inspection, as described in the agency's internal report of April 2, was less comprehensive than previous ones and had as its "main purpose . . . to review and check on the responses TNS had made to the last compliance letter, look at and discuss their environmental program . . . and tour the site to observe the present operations."[14] During this inspection, TDRH officials first observed employees wearing respirators pursuant to the Respondent's mandatory full-time program. According to the internal report, "The use-overuse of respirators was discussed. . . . I stated that studies should be conducted to look for ways to reduce use. I stated that to me the routine (full 8 hours

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[14] This was a special inspection, made in response to an employee's anonymous complaint concerning conditions at the TNS plant. During this visit, TDRH officials did not ask to review the Respondent's exposure records. It is thus misleading for our dissenting colleague to suggest that the Respondent "failed to disclose" the data contained in its files.

shifts) use of masks is not to be done. Their use should be for unusual, emergency or short duration jobs."

The TDRH internal report concluded that the "inplant site is not as contaminated as noted several years ago. . . . There are many areas that need improvement and constant updating but it appears that at the present time no crisis or eminent [sic] threat to health and safety exist." Rather than citing any violations, the TDRH enforcement letter of May 4 provided "comments, suggestions, and requirements" to be observed. Regarding respirator use, the letter advised the Respondent to conduct studies of ways to substitute engineering safeguards for respirator use.

Also on March 10, as TDRH was finishing its last prewalkout inspection, the Union delivered the following message to the Respondent:

> [T]he employees will not return to work after April 30 until the items which are on the health and safety report have been corrected and TNS is safe and healthy for the employees to work. This includes the items from past inspections as well as items which will be listed during the April inspection.

On March 24, the parties began formal negotiations by presenting their respective comprehensive proposals for a successor collective-bargaining agreement.[15] The

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[15] The Respondent's chief negotiator was George Kriska, vice president of industrial relations at Aerojet General Corporation, the Respondent's parent corporation in Compton, California. Representing the Union were Local President Bettis, Business Agent Larry Abel, and, on occasion, International Union District Director John Williams.

Respondent made a proposal which included provisions for: $1-dollar-an-hour wage increase; extension of the permissible temporary layoff period from 24 hours to 10 days; extension of the probationary period from 90 days to 180 days; and retention of the existing health and safety clause. The Union's proposal included a much lengthier health and safety clause requiring, among other things: retention of the joint union-management health and safety tours; plant inspection by union officials; independent health surveys to be paid for by the Respondent; a commitment by the Respondent to maintain adequate health and safety facilities; and a statement that no employee would be required to perform work which endangered health or which violated health and safety rules.

The parties met eight more times prior to the contract's April 30 expiration. Sessions held on March 25 and April 8 and 9 focused mainly on noneconomic issues. There was little discussion of health and safety. The Union expressed suspicions, however, that the Respondent's proposed extensions of the probationary and temporary layoff periods entailed a scheme by which the Respondent could more freely remove employees with high radioactivity exposure levels and thereby avoid responsibility for their health. Abel warned that this was a "strike issue."

It was not until the April 24 bargaining session that health and safety became a principal topic of discussion. This meeting began with Abel charging that the Respondent's "safety stinks" and that the Union had "people in Washington working on your damn license." After some acrimony, the parties returned to a clause-by-clause

review of their respective proposals. The Union continued to oppose the Respondent's probation and layoff proposals. The Respondent continued to oppose the Union's health and safety proposal. As the session drew to a close, Williams castigated the Respondent for requiring employees to wear respirators. Abel concluded the meeting with the warning that: "we can 'guar-damn-tee' we are going to strike on April 30 on health and safety."

Talks resumed the next day and centered almost entirely on the Union's protest against the full-time wearing of respirators. The Respondent attempted to justify its respirator policy as a temporary measure that was being implemented only until engineering or equipment changes could be made to reduce airborne contamination and to comply with the ALARA philosophy. When told that employees had been on respirators for about 2 months, Williams replied that "we are not going to work under those conditions." He rejected the Respondent's contention that the employees are protected when wearing respirators and stated that "if I had known about all this, we'd been on the street. If you don't think I will put you on the street, under health and safety you are mistaken."

The next meeting was held on April 27 under the auspices of the Federal Mediation and Conciliation Service (FMCS).[16] At the behest of the FMCS mediator, discussion was restricted to noneconomic matters. Agreement was reached on a number of proposals and counterproposals, but the parties remained apart on the

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[16] All subsequent negotiations were mediated by FMCS.

temporary layoff and health and safety issues. They did modify initial proposals on the probationary period issue. The Respondent proposed 150, rather than 180 working days; the Union proposed 40, rather than 30 calendar days. The Respondent indicated that it would agree to submit to an independent evaluation of its safety program and asked the Union for the names of available consultants. The Union suggested its own experts or the National Institute of Occupational Safety and Health (NIOSH).

The parties met again the next day. After a brief discussion of several proposals, including the Respondent's offer to reduce the probationary period to 120 working days, the Union declared that negotiations were a "waste of time" and requested that the Respondent submit its final offer the next day. As requested, the Respondent submitted a final contract offer to the Union on April 29 with an explanation of some of its terms, highlighting again that it contained an across-the-board hourly raise for all unit employees. The Union's immediate response, expressed by Abel, was that a strike was likely. He accused the Respondent of bargaining in bad faith and of "trying to buy a damn contract" with an offer that the Union considered was "still $2.00 low." Williams added that "our biggest problem is health and safety. You have overexposed every one at this table, and everybody at the plant." Referring to the health and safety strike ultimatum of March 10, Abel declared that "we are going to have a strike tomorrow night."

The strike option was also a subject of union and employee discussion away from the bargaining table.

Employee Mike Elam testified that he told Abel in October or November 1980 that employees wanted to strike then to protest health and safety conditions. Abel advised against doing so, explaining that employees would jeopardize their jobs if they struck before the contract expired. (The contract contained a no-strike clause.) Minutes of the Union's November 1980 meeting contain the entry "April 30 strike!" Some employees did not wait, however. In March, a group from the penetrator shop engaged in a wildcat strike to protest the mandatory respirator program. Bettis persuaded them to return to work.

On April 4, the employees authorized a strike action. On April 29, they gathered again to discuss what they were going to do when the contract expired. Various individual employees voiced dissatisfaction with the Respondent's hourly wage raise offer and with the health and safety conditions at the TNS plant. The employees voted to strike. At midnight on April 30, virtually the entire work force of 100 men and women engaged in a work stoppage.

The Respondent made no attempt to continue operations during the first 3 months of the strike. While the plant sat idle, it continued to negotiate with the Union and submitted to inspections by TDRH and by Radiation Management Consultants (RMC), a private consulting firm hired by the Respondent. TDRH conducted a 2-day inspection on May 5-6 in response to a telegram sent by the Union on April 29 warning of "eminent danger" [sic] due to high urine counts received by some employees and the mandatory use of respirators for "the full 8 hour shift." RMC conducted its investigation on May 13 and 14.

RMC sent its report to the Respondent on May 29. The report found that air concentrations within the plant were "slightly in excess of MPC" and that the Respondent's engineering controls were inadequate to reduce airborne contamination. The report found particular fault with the mandatory respirator program, which was deemed to be too long in projected duration (until August, when new ventilation and shielding equipment was to be installed) and not in compliance with the requirements of Reg. Guide 8.15 relating to employee training and the proper use, fit, cleaning, storage, and maintenance of respirators. Although indicating that lower urine bioassays began to occur after implementation of the respirator program, RMC stated that the failure of bioassay levels to fall even lower supported the inference that the discomfort of prolonged shift-long respirator use had led employees "to cheat on the wearing of masks."

The RMC report's conclusion was mixed. While noting "many areas of noncompliance [which] should be of great concern to management" and a "lack of management commitment to a radiation safety program," RMC also found "DU is a rather innocuous radioisotope and with exposure limits to radiation and airborne concentrations based on 50 years of exposure, short periods of exposure to radiation or airborne concentrations slightly in excess of MPC presents no real hazard."

One week later, on June 4, TDRH reported on its May 5-6 inspection. In a one-page letter to the Respondent, TDRH identified virtually the same deficiencies found by RMC, i.e., inadequate engineering controls and airborne

concentrations of DU dust exceeding MPC.[17] In its separate reply to the Union's April 29 complaint, TDRH stated that "some employees have been 'relocated' because urine sample results exceeded the action levels . . . [which] appear to be in line with those utilized at other facilities within the industry . . . [and which] appear to have been set at values below those levels at which hazards to employees have been shown to exist."[18] As for the allegation of excessive respirator use, TDRH told the Union that it was requiring the Respondent to establish the basis for such use and to explain why engineering controls were inadequate to reduce concentrations of airborne DU.

On June 3, the parties met for the first bargaining session since the beginning of the strike. The Union made a health and safety proposal that the Respondent discontinue respirator use by December 1 and hire an outside consultant to make a study of TNS plant safety. In response to the respirator use deadline, the Respondent acknowledged that it had "areas where air contamination is outside the limits" and explained that it was currently making efforts to correct its engineering controls. It

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[17] The letter did not cite the Respondent for overuse of respirators even though the underlying TDRH report echoes a prior report in finding that "there were individuals in the penetrator shop who were being required by management to wear respirators for the duration of 8 hour working shifts" and that the Respondent admitted that "there were eleven other areas . . . as requiring additional respiratory protection" but not according to the Respondent, for an entire shift.

[18] TDRH apparently was referring to DARCOM's action levels, rather than those set out in Reg. Guide 8.22.

declined to commit to a specific deadline for termination of the mandatory respirator program until such corrections were made. With respect to the suggestion of an independent inspection, the Respondent failed to disclose that it had commissioned the RMC study. It stated that it was amenable to an inspection by an outside consultant if the Union split the cost. The Union refused, claiming it could not afford this arrangement.

By the end of June, the Respondent decided to resume production in August. Hoping to avoid the necessity of hiring replacements, TNS officials met with the Union's International president during the weekend of July 4 in an unsuccessful attempt to reach a settlement to the work stoppage. On July 8, the Respondent notified its employees by letter that it would begin hiring permanent replacements on July 16. The letter further stated that TNS had "been thoroughly inspected and advised that our employees face no imminent health-safety danger."

On July 16, the parties met again. This session started with a closed-door meeting between the Union and the Federal mediator. When bilateral discussions resumed, the Union accepted the Respondent's original $1-an-hour-wage raise proposal. It soon became clear that the only two issues dividing the parties were the Respondent's 10-day layoff proposal and the Union's health and safety proposal. Abel's "biggest fear" was that "the 10-day layoff is completely tied to health and safety" because of the possibility that the proposal would be used by the Respondent to put overexposed workers "out to pasture." In Abel's view, "if these items were straightened out, we

might have a contract." Although there was some movement on the layoff issue, the parties were unable to conclude an agreement.

The parties' final negotiation session in 1981 took place on September 3. The only subject discussed was the number of bargaining unit jobs remaining after the hiring of permanent replacements. The Respondent informed the Union that no vacancies existed. The meeting ended with dim prospects for settlement.

Accompanied by an NRC official, TDRH investigated the TNS plant over a 3-day period in mid-October and another 2 days on December 17 and 18.[19] In a letter dated January 28, 1982, the Respondent was cited with a list of familiar violations, including air contamination above MPC in the foundry throughout the last and first quarters of 1981 and the failure to notify employees of "their exposure to excessive levels of airborne radioactivity." In a concluding paragraph, TDRH stated "it appears that your safety program was inadequate to protect workers from unnecessary radiation." The Respondent was urged to direct its attention "toward revamping [its] program . . . to insure that employees will no longer be unnecessarily exposed to radiation."

At the request of TDRH, NIOSH investigated the Respondent's facilities on November 20 and December

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[19] As noted in the internal report, "the primary purpose of the visit was to attempt to collect enough data to determine each employee's exposure to radiation and radioactive material at least per quarter over the past year (October 1, 1980, to September 30, 1981)."

14-17 in order to provide technical assistance in evaluating potential health hazards of exposure to DU at TNS. NIOSH examined TNS employees' TLD readings of external whole body exposure, in-vivo lung scans, and urine bioassays. NIOSH found that "whole body doses for production workers from 1975 to 1980 ranged from 1.06 rems to 2.16 rems," with none having "ever exceeded 5 rems per year whole body dose" since 1978.[20] NIOSH concluded that these doses, "while for the most part within legal limits, were higher than doses observed among workers in other parts of the uranium fuel cycle and other U.S. nuclear industries." From in-vivo testing data, NIOSH determined that between 1978-1981 "32% of the hourly work force had a yearly dose to the lung of 5.3 to 15.9 rems per year" which, although within "the accepted radiation guidelines allow[ing] a maximum annual lung dose of 15 rems," represented "an inadequate margin of safety." NIOSH did not make any independent conclusion based on these readings.

With respect to urine bioassays, which NIOSH "considered the critical factor in calculating safe [internal] exposure levels," it recommended that TDRH and TNS follow the nonmandatory NRC Reg. Guide 8.22 notice and action levels. It also found that between 1977 and 1981 an annual average of 52 percent of the TNS production work force had one or more bi-monthly urine samples greater than the higher DARCOM notice levels of 50 ug/l and 19.5 percent had one or more samples greater than 100 ug/l NIOSH concluded that

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[20] Findings pertaining to whole body exposure in 1981 were not included.

> [U]rine uranium concentrations exceeded NRC guidelines for bioassay at uranium mills, but not the less stringent [DARCOM] standards enforced by the state. Because the NRC guidelines are set to protect workers from the toxic effect of uranium to the kidneys, we may infer that that [sic] there is some possibility of renal damage among TNS workers who had urine uranium concentrations exceeding this level. . . . Since the majority of TNS workers had very short durations of employment it is unlikely that they have measurably altered changes in renal function. We have therefore concluded that a medical study of renal function in this population would not be useful.

The situation at the TNS plant was the subject of a Congressional hearing on December 8. Among the witnesses at the hearing were TDRH Director William Graham and NRC Office of State Programs Director G. Wayne Kerr. Graham reviewed his agency's actions vis-a-vis TNS. In specific reference to the mandatory respirator program, he stated

> Since the levels of dust monitored in the penetrator shop exceeded the maximum allowable by only a small fraction, we felt fairly confident that workers were being protected, provided respirators were being worn correctly and consistently. The effective use of personal protective equipment – and I think this has been demonstrated here today in testimony – such as respirators is difficult for the Division to monitor and the company to enforce.[21]

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[21] H.R. Rep. No. 102, 97th Congress, 1st Sess. at 232 ("Gore Report").

Kerr generally reviewed NRC's authority and the "Agreement State" program. He specifically described NRC's oversight of the TDRH program and its handling of the TNS safety situation. He concluded that "we believe that Tennessee is carrying out its regulatory responsibilities in the TNS case in an appropriate manner."[22] Kerr also commented about references made during the hearing to NRC regulatory guides. He noted that each guide specifically states that "[r]egulatory guides are not substitutes for regulations and compliance with them is not required. Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the commission."[23] Kerr also stated that uranium mill bioassay levels described in NRC Reg. Guide 8.22 were "inappropriate to the [TNS] case being discussed."[24]

On February 15, 1982, 10 months after the strike began, the Union submitted to the Respondent an unconditional offer to return to work on behalf of the employees. The Respondent replied that there were no job openings at that time as all positions were currently held by permanent replacements. The parties continued to meet and negotiate until, on May 3, 1982, the Respondent received a decertification petition signed by 70 of the 73 employees then working at the plant stating they no longer wished to be represented by the Union. Soon

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[22] Id. at 245.

[23] Id. at 246.

[24] Id.

thereafter, the Respondent withdrew recognition from the Union and since that time has refused to bargain.

B. *Contentions of the Parties*

The General Counsel and the Charging Party Union submit that the employees ceased work because they believed in good faith and on an objective basis that conditions at their workplace had become abnormally dangerous, within the meaning of Section 502 of the Act, because of hazards associated both with exposure to DU and with the mandatory respirator program. The General Counsel and the Union further contend that employees who quit work pursuant to Section 502 have rights and privileges equivalent or superior to unfair labor practice strikers; therefore, when the Respondent advised its employees that it was going to hire permanent replacements and thereafter refused to reinstate the employees immediately after their unconditional offer to return to work, it violated Section 8(a)(3) and (1).

The Respondent contends that the employees were engaged in an economic strike in support of the Union's position in negotiations for a successor agreement and that they were therefore not engaged in a good-faith safety protest within the meaning of Section 502. Furthermore, the Respondent and amici United States, ANI, and MAELU contend that the radiation exposures received by the employees were acceptable under Federal and state regulatory standards to which the Board should defer and thus, by definition, abnormally dangerous conditions within the meaning of Section 502 did not exist at the plant. Finally, the Respondent and amicus Chamber of

Commerce submit that, even if abnormally dangerous conditions did exist, Section 502 operates solely to exempt employees from adherence to a contractual or statutory no-strike provision when they cease work because of such conditions; it does not create a separate employer unfair labor practice for maintaining unsafe conditions, nor does it confer upon employees engaged in such a work stoppage the right to reinstatement immediately upon their unconditional offer to return to work.

C. *The Judge's Decision*

The judge found that the employees ceased working in a good-faith protest of working conditions which, on the basis of objective evidence, were abnormally dangerous within the meaning of Section 502. Preliminarily, she expressed the view, inter alia, that under the applicable objective evidence test: the General Counsel must prove that employees' "perceptions were reasonably based on verifiable grounds," rather than prove danger-in-fact; an employer's failure to take available abatement actions may be a factor; and the applicable regulatory standards, including the ALARA concept, were relevant, but there is no prima facie requirement to prove that the Respondent consistently exceeded those standards. She then identified the following as objective evidence of abnormally dangerous working conditions:

> (1) air quality of the facility exceeded MPC at 11 work stations for at least the last quarter preceding the strike; (2) the protracted use of respirators by a substantial number of employees was deleterious to their health; (3) the employees' average whole body uranium exposures were

> far greater than those typical for the nuclear industry; and (4) that repeated and excessive uranium-in-urine levels indicated serious risk of kidney damage. I further conclude that these conditions came about and were not soon abated because Respondent failed to comply diligently with governmental codes prescribing sound health physics practices.[25]

The judge further concluded that although employees who engage in a Section 502 work stoppage are not strikers, the provision bestows on them "special protections," akin to those enjoyed by unfair labor practice strikers, which prohibit their suffering "any penalty" including the penalty of permanent replacement. Accordingly, she found that by permanently replacing and refusing to reinstate the employees when they offered to return to work without condition, the Respondent violated Section 8(a)(3) and (1).

D. *Analysis*

1. Failure to meet test for "abnormally dangerous"

Contrary to the judge, we find that the General Counsel has failed to prove that, at the time of the May 1, 1981 employee walkout at TNS, the totality of available evidence supplied a sufficient basis for a reasonable good-faith belief that the employees' working conditions were "abnormally dangerous" within the meaning of Section 502. Thus, the General Counsel has failed to show

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[25] Judge's decision, slip op. at 116.

that the TNS employees reasonably believed, on the basis of objective evidence, either that conditions at the Respondent's plant had changed to an extent necessitating a walkout or that the employees' cumulative exposure to DU had reached the point at which further exposure would have posed unacceptable hazards. In the latter regard, we give substantial weight to the fact that TDRH never sought, or even considered seeking, measures available to it that could have required any shutdown of all or part of the TNS operations. Because we find that Section 502 does not cover the May 1 walkout, we need not pass on whether an employer can lawfully hire permanent replacements for employees who are engaged in a Section 502 work stoppage.

As we explain in more detail below, in applying the "abnormally dangerous" clause of Section 502 to employee walkouts assertedly prompted by conditions in industrial operations that use or generate nuclear materials posing radioactive hazards, we do not, contrary to the suggestion of our dissenting colleague, require the proponents of Section 502 coverage to prove that conditions were *in fact* abnormally dangerous at the time of the walkout or that employees were actually manifesting physical injury or on the verge of doing so as a result of conditions in the plant. We recognize that the issue is more complex than that presented by the case of, for example, an apparently imminent mine roof collapse.

In applying our test, we also do not, contrary to our dissenting colleague's suggestion, abdicate to TDRH or any other agency our responsibility to decide the legal

and factual issues in this case. We simply take the position that, in a highly regulated industry like that involving nuclear materials, an individual cannot form a reasonable belief concerning whether conditions in a particular plant are abnormally dangerous without giving due consideration to the views of the agency that is charged under the Federal scheme with monitoring safety conditions, that is empowered to secure shutdowns or changes in plant procedures if the safety of the workers requires it, and that is required to consider complaints filed by any person about safety conditions in the plant. We see this as essential lest we allow the invocation of Section 502 as an end run around the statutes directly applicable to worker safety in this industry, at least where, as here, there was no evidence that the monitoring agency was failing to do its job and no objective evidence at the time of the walkout from which a reasonable person could conclude that hazards were being actively concealed from the monitoring agency.

In this regard, we are struck by the undisputed evidence that the Union, as the employees' representative, stated an intention to strike over safety issues as early as March 10, but evidently perceived no need at that time either to walk out immediately or to seek answers concerning its complaints from TDRH, the agency with power to undertake unannounced inspections and to require the submission of safety data. It was not until April 29 – virtually on the eve of contract expiration and the walkout – that the Union sent a telegram to TDRH regarding the complaints that were said to justify the strike (which had been formally authorized by the employees on April 4). We see nothing occurring or made

known to the Union and the employees between March 10 and May 1 that provided a reasonable basis for converting a belief that conditions were not abnormally dangerous (i.e., so dangerous as to call for immediate departure from the workplace) into a belief that they were. Indeed, although one of the Union's chief complaints concerned the Respondent's implementation of the respirator program, as late as June 3, the Union was willing for the use of respirators to continue until December 1. In this respect, not only the Union's actions, but even its very bargaining position, are inconsistent with our dissenting colleague's arguments.

a. *The meaning of "abnormally dangerous conditions" in light of the legislative history of Section 502*

We begin with the language of the statute. Added as part of the 1947 Labor Management Relations Act, commonly called the Taft-Hartley Act, Section 502 reads in full:

SAVING PROVISION

> Sec. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for

work at the place of employment of such employee or employees be deemed a strike under this Act.

We are concerned here with interpreting the final clause of Section 502. Its plain meaning is that one or more employees who quit labor because of abnormally dangerous conditions for work are not engaged in a strike. Neither Section 502 nor its legislative history offers any definition of "abnormally dangerous." Senate debate culminating in proposal of the historical antecedent of the final clause of Section 502 indicates that Congress focused on the simple concept of protecting employees from being compelled to work by no-strike sanctions in situations of obvious and immediate physical danger, such as one in which a coal mine explosion is imminent.[26] The task of defining the term "abnormally dangerous" has therefore been left to the Board and reviewing courts.

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[26] The origin of the final clause of Sec. 502 is traceable to Senate floor debate about the Case bill, legislation which was passed by Congress but successfully vetoed by President Truman in 1946. Provisions of that bill would have imposed mandatory mediation and cooling-off periods for parties engaged in certain types of labor disputes. Individuals striking during the cooling-off periods would have forfeited their status as employees under the Act. As a result of expressions of concern for employees confronted with abnormally dangerous working conditions during the cooling-off period, language identical to the final clause of Sec. 502 was added to the Case bill, Legislative History of the Case bill; H.R. 4908, 79th Cong., 2d Session, Cong. Rec. – Senate, 5678-5679, 5680-5681, 5711-5712, 5794.

In *Redwing Carriers*,[27] the Board stated:

> We are of the opinion that the term contemplates, and is intended to insure, an objective, as opposed to a subjective, test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered "abnormally dangerous."

The Supreme Court approved the Board's objective evidence test in *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368 (1974). The Court stated "that a work stoppage called solely to protect employees from immediate danger is authorized by Sec. 502,"[28] but it disagreed with the lower court majority's conclusion "that an honest belief, no matter how unjustified, in the existence of 'abnormally dangerous conditions for work' necessarily invokes the protection of Sec. 502."[29] Instead, quoting from the dissenting opinion below and citing *Redwing Carriers*, inter alia, the Court held that a party seeking to prove coverage by Section 502 "must present 'ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists.' "[30]

As we discuss further below, the definition of "abnormally dangerous" does not turn on a standard

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[27] 130 NLRB 1208, 1209 (1961), mod. 137 NLRB 1545, enfd, sub nom. *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (1963), cert. denied 377 U.S. 905 (1964).

[28] 414 U.S. at 385.

[29] Id. at 386.

[30] Id. at 387 (citation omitted).

degree of deviation from a single norm of industrial safety. Evaluation of objective evidence of abnormally dangerous conditions must therefore proceed on a case-by-case basis.

Consistent with the manifest congressional intent of drawing a narrow "saving" exception to the broad definition of the term "strike" in Section 501(2) of the Act,[31] and any consequent no-strike obligation imposed by law or by contract, the burden of objective proof imposed under Section 502 is a heavy one. Indeed, in over 40 years since the passage of Section 502, the Board has found abnormally dangerous working conditions in only six contested cases.[32] Each of those cases involved objective proof of tangible and immediate physical dangers which were substantially greater than those presented by normally existing conditions at the subject workplace.

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[31] That section states:

> (2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

[32] *Richmond Tank Car*, 264 NLRB 174 (1982); *Combustion Engineering*, 224 NLRB 542 (1976); *Roadway Express*, 217 NLRB 278 (1975); *Fruin-Colnon Construction Co.*, 139 NLRB 894 (1962), enf. denied 330 F.2d 885 (8th Cir. 1964); *Philadelphia Marine Trade Assn.*, 138 NLRB 737 (1962), enfd. 330 F.2d 492 (3d Cir. 1964), cert. denied sub nom. *Longshoremen ILA v. NLRB*, 379 U.S. 833 and 841 (1964); *Knight Morley Corp.*, 116 NLRB 140 (1956), enfd. 251 F.2d 753 (6th Cir. 1957), cert. denied 357 U.S. 927 (1958).

In the present case, we address for the first time the applicability of Section 502 to the intangible threat of occupational exposure to carcinogens and chemical toxins. Although there is no indication that Congress had this kind of hazard in mind in 1947, we find that the protective intent expressed through Section 502 is applicable to hazards such as those posed by the use of DU at the TNS plant. Objective proof of abnormally dangerous conditions in this context is complicated, however, by the insidious nature of invisible hazards which may not result in ascertainable physical injury for years.

We reject any motion that objective proof of abnormally dangerous conditions in this context must include a showing of present injury by cancer or poisoning,[33] and we agree with the judge that the General Counsel need not prove abnormal danger-in-fact under the *Gateway Coal* test. On the other hand, the mine disaster paradigm which motivated the proposal of the Case bill's "abnormally dangerous" language, the Court's references in *Gateway Coal* to "immediate danger" and "identifiable, presently existing threat,"[34] and Board precedent applying the objective test under Section 502 all support the view that there must be some manifest *present* need for employees to quit the workplace. Consistent with that requirement, we find that a party attempting to demonstrate Section 502 coverage in the context of employee

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[33] Such a requirement would be inconsistent with long-settled Board law. See, e.g., *Roadway Express*, supra, 217 NLRB at 280; *Fruin-Colnon*, supra, 139 NLRB at 905; *Knight Morley Corp.*, supra, 116 NLRB at 144.

[34] 414 U.S. at 385 and 386.

exposure in the workplace to radioactive and/or toxic substances may do so by showing that the employees reasonably believed, on the basis of objective evidence,[35] *either* (1) that inherently dangerous conditions in the subject workplace had changed significantly for the worse, so as to impose a substantial threat of imminent danger if exposure were continued at the time the employees began to withhold their services, *or* (2) that the cumulative effects of exposure to those substances had reached the point at which any further exposure would pose an unacceptable risk of future injury to employees.

The first prong of our test reflects the following reasoning set out by the Board in *Anaconda Aluminum Co.*, 197 NLRB 336,344 (1972):

> Absent the emergence of new factors or circumstances which change the character of the danger, work which is recognized and accepted by employees as inherently dangerous does not become "abnormally dangerous" merely because employee patience with prevailing conditions wears thin or their forbearance ceases.

Our second prong allows for the fact that, in the case of exposure to radioactive or toxic substances, an employee's entry into the zone of "abnormally dangerous" conditions, e.g., exposure levels, may in some circumstances be foreseen as occurring not as a result of any change in the workplace but simply as the result of crossing a cumulative exposure threshold.[36]

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[35] See *Red Wing Carriers*, supra.

[36] We also allow for the possibility of exceptional circumstances in which the place of employment presents abnormally

As discussed below, we find that the General Counsel has failed to establish the applicability of Section 502 under either of the foregoing alternative tests. First, there is insufficient proof that the employees reasonably believed that the dangers which were inherent in the TNS workplace had changed materially for the worse at or around the time of the walkout. Second, the record does not indicate that the TNS employees reasonably believed, on the basis of objective evidence, that their cumulative exposure to DU had reached a level at which any further exposure would have been unacceptably risky. As indicated at the outset, in evaluating the reasonableness of the employees' professed belief, we find of some significance the fact that the employees could have consulted TDRH before the walkout and that it was the view of that monitoring agency, as well as the NRC, that conditions at the TNS plant, although plainly in need of improvement, were not so dangerous as to require removal of employees from the plant pending corrective action by the Respondent.

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dangerous conditions that are evident virtually from the time that employees begin work there. In such circumstances, however, employees acting on a reasonable belief would not stay long in the workplace. As explained below, we would not find, under any assumption-of-the-risk theory, that a Sec. 502 walkout would be unavailable to such employees who walked out as soon as objective evidence of abnormally dangerous conditions was apparent.

b. *Application of first prong of the "abnormally dangerous" test in this case*

In applying the first of our two alternative means of establishing Section 502 coverage, we note that the inherent dangers of working with DU, even in a state-of-the art environment of physical engineering controls, are undisputed. Indeed, evidence in this case concerning the no-safe-threshold view of occupational exposure to low-level radiation, and the related ALARA cost-benefit concept serves more to underscore those inherent industry wide dangers than to prove the abnormality of dangerous conditions at TNS. As a normal working condition, employees engaged in the kind of production work performed at the TNS plan prior to the work stoppage faced a greater likelihood of cancer or kidney damage than most other worker populations. Furthermore, in accord with *Anaconda Aluminum*, supra, the appropriate benchmark of normalcy for evaluating the claim of abnormal danger is set by the "prevailing conditions" at the TNS plant, rather than by conditions in the nuclear industry at large or in the industrial subgroup of employees working with DU. This is true even if the existing dangers of the subject workplace are significant.[37]

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[37] See, e.g., *NLRB v. Fruin-Colnon Construction*, supra, 139 NLRB at 904; *L. E. Meyers Co.*, 270 NLRB 1010, 1011 (1984); *Anaconda Aluminum*, supra, 197 NLRB at 344. Of course, under our second test (sec. c, infra), the General Counsel may seek to establish that at some point the existing conditions would likely produce whole body radiation exposures and urine bioassay levels that would cross an abnormal danger threshold. As we explain below, however, there is no objective evidence on which the employees could have concluded that they were closely approaching such a threshold when they walked out on May 1.

It is apparent that the DU-exposure prevention program at the TNS plant was less than state-of-the art. For several years prior to the May 1, 1981 work stoppage, the Respondent's facility had a level of airborne DU-contaminants, and consequent employee exposure, higher than it could have been had the Respondent faithfully followed the ALARA concept.[38] The degree of exposure levels remained relatively constant however, although data for whole body radiation exposures and uranium in urine had shown a gradual upward trend since 1979.

In the few months preceding the work stoppage, there were no significant new factors or circumstances changing the character of the prevailing danger involved in working at the TNS plant. In this regard, we disagree with the judge's characterization of the Respondent's mandatory respirator program, introduced in January 1981, as a change constituting independent evidence of abnormal danger. The prolonged wearing of respirators created discomfort for certain employees and was an inadequate long-term substitute for physical engineering controls against DU-exposure hazards, particularly in light of the Respondent's failure to comply with NRC Regulatory Guide 8.15 and the supplemental NUREG manual. But the respirator program did not itself create or exacerbate any health and safety hazards.[39] Indeed, the

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[38] The substandard conditions listed in the dissent, e.g., leakage and spillage of greensalt, were among the factors that contributed to the elevated exposure levels.

[39] There was, for instance, no objective evidence that the mandatory respirator program created abnormal cardio-pulmonary risks.

RMC report, which was highly critical of the respirator program, indicated that it may have contributed to a *reduction* of urine bioassay levels. Finally, and perhaps most significantly for the purposes of judging whether the employees reasonably believed – or even actually believed – that the mandated use of the respirators created an abnormally dangerous condition as of May 1, it is undisputed that on June 3, the first negotiating session after the strike began, the Union's health and safety proposal included a proposed requirement that would have permitted the Respondent to continue using respirators until *December 1*.

In the judge's opinion, which is evidently shared by our dissenting colleague, the Respondent's administration of its health and safety program was also a factor in considering whether the continuing level of DU-exposure hazards was abnormally dangerous. Indeed, the crux of the judge's decision appears to be her concern that the Respondent did not take timely, reasonable, and available corrective measures in reaction to governmental directives and a substantial body of scientific opinion indicating a direct incremental correspondence between DU-exposure levels and the incidence of cancer or kidney damage. Although, like our colleague, we share the judge's disapproval of the Respondent's conduct in maintaining inherently dangerous working conditions that could reasonably have been made safer, we find that they have misconstrued the precedent interpreting the narrow scope and protective intent of Section 502.[40] Contrary to

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[40] We note that the judge's rationale would have dictated a different result in *Gateway Coal* itself. As characterized by dissenting Justice Douglas, that case involved "the most dangerous

the judge and our colleague, the Respondent's mere maintenance of prevailing conditions in the TNS workplace did not transform existing dangers there into abnormal dangers on or around May 1, 1981, absent either some "ascertainable, objective proof" that employees confronted a substantial change in the risk of cancer or kidney injury from DU exposure if they remained at work or proof under our alternative test that cumulative exposures had reached a critical threshold. There is no such evidence. The only change of consequence occurring on or near the date of the work stoppage was the expiration of the collective-bargaining agreement at midnight on April 30, an event irrelevant to workplace safety, and as we explain in section c below, the record evidence is also insufficient to satisfy the second test.

We also find the conduct of the employees and their Union in the months preceding the strike relevant in determining whether they had a reasonable belief that significant changes in working conditions rendered working conditions abnormally dangerous as of May 1, when

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occupation in America," as measured by the Bureau of Labor Statistics, and a mining operation classified by the United States Bureau of Mines as "especially hazardous." Congressional testimony about prevailing conditions at this mine had detailed a history of supervisory negligence in safety matters, 414 U.S. at 388. Mining employees engaged in a work stoppage to protest the employer's reinstatement of two foremen who faced criminal charges of falsifying mine airflow records essential to the monitoring of deadly methane gas levels in the mine. The Court majority nevertheless found that the work stoppage was not protected by Sec. 502, because the Union's claim did not concern "some identifiable, presently existing threat to the employees' safety." Id. at 386.

they walked out. In October-November 1980, and again in March 1981, some employees considered striking to protest working conditions. They were dissuaded from doing so by union officials. At least by January 1981, those officials, particularly Local Union President Bettis, were more specifically aware of the invisible dangers attendant to the physically manifest working conditions at TNS. They repeatedly referred to health and safety problems in monthly labor-management plant tours and in contract negotiations. Although periodically threatening strike action upon expiration of the contract, they made no attempt to relate May 1 to any objective evidence that conditions by that date would become unreasonably dangerous. Of equal importance, they made no effort until virtually the eve of the strike to bring TDRH into the plant to make an inspection that might have confirmed any suspicions.

In sum, we find that the General Counsel has failed to show that the employees reasonably believed, on the basis of objective evidence, that abnormally dangerous working conditions existed on the date of the walkout, as measured by reference to the inherently dangerous conditions which had prevailed at the TNS plant for a long time. There were no "new factors or circumstances" which changed the character of the prevailing danger on May 1. All that occurred on that date was expiration of the contract and a walkout by employees in protest of conditions that, at least in one important respect (urine bioassay levels), may actually have been improving.

c. *Application of second prong of the "abnormally dangerous" test in this case*

Although the General Counsel has not shown that the employees reasonably believed that any material change in the degree of danger inherent in working at the TNS plant had occurred at or near the time of the walkout, that failure alone is not dispositive of the Section 502 issue. As we have indicated, in a workplace such as the TNS plant, at which employees are subjected to repeated exposure to radioactive or toxic substances, the cumulative exposure level may build, over time, to a point at which further exposure may pose unacceptable risks to the work force, even though no material change in the employees' working conditions may have occurred. In such a case, the fact that the employees may have worked under inherently dangerous conditions for a long time without protesting or quitting work would not preclude a finding that the Section 502 protection applies. It is likely that only by "accepting" such conditions over a period of time would employees reach the levels at which further exposure would pose excessive risk. To deny employees the protection of Section 502, even though they have reached a critical exposure threshold because they had previously "accepted" dangerous conditions, would be a *Catch*-22 result that obviously would vitiate the purposes of Section 502.

For the foregoing reasons, we hold that the General Counsel also may demonstrate the presence of abnormally dangerous conditions by showing that employees had a reasonable belief, grounded in objective evidence, that such a danger threshold had been reached. In this

case, however, the General Counsel has made no such showing. The record does not even establish what that threshold level of exposure is, let alone that the employees reasonably believed that it, or any such level, was reached or exceeded at the TNS plant at any material time.

In assessing the employees' objective grounds for a reasonable belief on this matter, we are of the view, as noted at the outset, that we should take account of the actions of the agencies charged under the nuclear safety program originally established under the Atomic Energy Act with the responsibility for monitoring radiation hazards in plants such as TNS. As recited in our statement of facts, this regulatory authority is vested in the NRC and in "agreement state" agencies such as TDRH. We give substantial weight to those agencies; assessment of the dangers of DU-exposure at the TNS plant under relevant safety regulations.[41] We recognize that there is no exact equivalent of the term "abnormally dangerous" working

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[41] We also find it appropriate to accord the same degree of weight to actions by NIOSH, which was requested to investigate the Respondent's plant by TDRH, except to the extent that NIOSH's actions are premised on standards which TDRH and NRC did not apply to the Respondent's operations. In this regard, we do not accord substantial weight to findings and recommendations by NIOSH which are based on urine bioassay standards set forth in proposed Regulatory Guide 8.22. In congressional testimony, NRC Official Kerr expressly rejected the view that this uranium mill guideline, which was in any event nonmandatory, was applicable to TNS plant operations. Gore Report at 246.

conditions in the NRC/TDRH regulatory lexicon. Consequently, the critical inquiry in evaluating the investigatory findings and recommendations of those agencies is whether they ever indicated that conditions at the TNS plant were so unsafe as to require removal of employees from the plant on May 1, 1981, or even serious consideration of taking such action.[42] The record is bereft of any such evidence.

As detailed in the preceding narrative of events, TDRH officials conducted seven separate investigations of nuclear safety conditions at the TNS plant from September 1979 through December 1981. One of these investigations took place on March 9 and 10, 1981, less than 2 months prior to the May 1 work stoppage. Another investigation took place on May 5 and 6, in direct response to the Union's complaints. Although some data relevant to contemporaneous employee exposure levels were not considered during the investigations that were conducted close to the date of the work stoppage, supplemental data covering the immediate prestrike period were reviewed

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[42] As indicated below, however, we allow for the possibility that it might be shown in a given case either that conditions had been concealed from the monitoring agencies or that there had been a significant abdication of regulatory responsibilities. And, of course, as also indicated above, if there is a showing that the employees had an objective reasonable basis for believing that their cumulative exposure levels were close to exceeding a known danger threshold, then the requirements of Sec. 502 would be met without regard to the monitoring agencies' failure to act.

during the complementary, extensive investigations by TDRH and NIOSH in late 1981.[43]

Viewed in conjunction, the testimony of agency officials, internal agency memoranda, official reports, and letters based on the aforementioned investigations provide objective evidence of the agencies' expert view that on May 1: (1) numerous aspects of the Respondent's safety practices remained in noncompliance with agency standards; (2) average airborne Du-contaminant levels were *slightly* in excess of MPC; (3) whole body and lung dosage radiation exposure levels were *within* Federal standards; and (4) urine sample results were frequently above DARCOM action levels, but the Respondent's relocation policies and the short employment tenure of the average TNS employee made kidney damage unlikely. There is no evidence of any significant change for the worse in DU-exposure hazards proximate to the date of the work stoppage. In fact, the TDRH internal report of the March 9-10, 1981 investigation stated that the "inplant site is not as contaminated as noted several years ago. . . . There are many areas that need improvement and constant updating but it appears that at the present time no crisis or eminent [sic] threat to health and safety exist."[44] Most significantly, there is no evidence

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[43] As we have noted, TDRH did not request the Respondent's exposure records during its March 1981 inspection, and there is no basis for concluding that the Respondent would have declined to produce the records if asked.

[44] Thus, although Member Devaney is correct in noting that there had been some increase in exposure to radiation at the TNS plant (at least prior to the use of respirators), there is no record evidence indicating that exposure levels had become

that either TDRH or the NRC ever considered exercising their authority to seek suspension or revocation of the Respondent's operating license, effectively shutting down the TNS plant, to protect employees from these hazards.

The judge has indicated her view that TDRH's regulation of the Respondent's operations is entitled to less weight in determining the existence of abnormally dangerous working conditions because relevant regulations were too lenient, TDRH lacked effective enforcement authority, and its findings and recommendations reflected a failure to seek independent verification of the Respondent's exposure data and representations about its

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dangerous. Whole body exposures, though somewhat elevated, never approached 5.0 rems per year, and, as the RMC report suggests, urine bioassays began to decrease after the respirator program was implemented in January 1981. Although TNS was faulted by the authorities for relying on such measures as respirators and employee relocation rather than moving more quickly to reduction of contaminants through engineering controls (the record indicates that the equipment for engineering controls was on order and due to arrive in August 1981), there was no evidence that these measures placed the employees at unreasonable risk. In this regard, it is noteworthy that the NRC "Standards for Protection Against Radiation" permit the use of "precautionary procedures, such as increased surveillance, limitation of working times, or provision of respiratory equipment" when "it is impracticable to apply process or other engineering controls to limit concentrations of radioactive material in air below [allowable levels]." 10 CFR § 20.103(b)(2). This would suggest that using such measures when process and engineering controls are not "impracticable" is a violation of regulations but not one that the NRC would regard as producing unacceptably dangerous working conditions.

safety program. We disagree. There may well be an occasion when a regulatory agency's review of safety conditions is so patently inadequate to identify hazards requiring removal of employees from the workplace that the Board should give little or no weight to agency action in assessing the objective evidence available to support a reasonable belief that conditions are abnormally dangerous. Clearly, however, this is not such a case.

The massive amount of conflicting scientific evidence and opinion in the record demonstrates that there is a considerable debate about safety standards (and the imposition of tort liability) in the nuclear industry. This does not prove, however, that the governing regulatory process is so clearly unreliable that the Board should not rely on it as an objective factor in deciding whether employees reasonably believed abnormally dangerous conditions existed at the TNS plant. Furthermore, in specific reference to TDRH's execution of its responsibilities, we note that NRC officials accompanied TDRH officials during both the November 1980 and October-December 1981 inspections of the TNS plant. In testimony at the Congressional hearing on December 8, 1981, NRC Office of State Programs Director Kerr said "[W]e believe that Tennessee is carrying out its regulatory responsibilities in the TNS case in an appropriate manner."

We recognize that TNS production employees were not privy to most of the voluminous scientific data, opinion, and analyses in the record of this proceeding relating to DU-exposure hazards in their workplace and may have lacked the educational skills necessary to gain full comprehension of the specific meaning of such information on their own. It is clear, however, that TNS employees

had a fundamental appreciation of the potential risks of working with uranium products. In addition, they daily confronted working conditions which required no special expertise to interpret: visible DU-dust, inadequate ventilating and shielding equipment, furnace blowouts, and unsanitary changing rooms. If in the months or weeks before the strike they believed that these, or unseen hazards, might pose abnormal dangers, the employees, acting individually or through their Union could have brought this evidence to the attention of either TDRH or the TOSHA (the state agency enforcing occupational safety and health standards) or both. They did neither until they had voted on the strike and were on the verge of walking out.

Based on the foregoing analysis, we find that the General Counsel has also failed to satisfy the alternative test for Section 502 coverage, namely that working conditions at TNS were such that the cumulative effects of exposure to radioactive or other toxic substances had reached the point at which any further exposure would pose an unacceptable risk in this industry of future injury to employees.

d. *Response to the dissenting position*

Member Devaney, in dissent, finds that the employees reasonably believed that conditions in the TNS plant were abnormally dangerous. When one gets past the hyperbole in Member Devaney's dissent, it is clear that his disagreement with us boils down to his finding that when the employees walked out on May 1,

they did so in response to conditions that were "abnormally dangerous" within the meaning of Section 502. We believe that our view of the evidence is in accord with the intent of Congress embodied in Section 502. For the reasons that follow, we reject Member Devaney's conclusion and underlying analysis.

Member Devaney cites no specific fact from which the employees could have formed a reasonable belief that conditions in the plant had worsened significantly around the time of the May 1 walkout. He nonetheless dismisses the absence of any showing of changed conditions around that time because, in his view, the conditions at the TNS plant before that date were "already unacceptable" – presumably meaning "already abnormally dangerous." He bases that finding on the fact that conditions at TNS were far below those prevailing in the nuclear industry generally, resulting in excessive exposure to DU, and on the Respondent's failure to make a sufficient effort to remove the threat to the employees' safety. Member Devaney thus finds *Anaconda Aluminum* inapplicable to this case, reasoning that, if "already unacceptable" working conditions exist, they do not have to become worse in order for a walkout caused by those conditions to merit the protection of Section 502. He finds that our adherence to the *Anaconda Aluminum* standard amounts to a requirement that employees "assume the risks of the workplace – even those caused by employer neglect."

Our colleague's analysis is wide of the mark. To be sure, if working conditions are already abnormally dangerous, no one would seriously contend that they would

have to deteriorate further in order to trigger the applicability of Section 502. To that extent, we are in perfect agreement with Member Devaney. We cannot agree, however, with his conclusion that, simply because conditions at TNS were worse than for the industry generally, leading to elevated exposure levels, and the Respondent had not taken all available measures to improve matters, it follows ineluctably that those conditions were abnormally dangerous. The test is not whether the Respondent might have taken measures that would have brought conditions in the TNS plant into conformity with the industrial norm. The test is whether the conditions that did exist were such that, in the language of *Gateway Coal*, the employees reasonably believed, on the basis of objective evidence, that if they continued working they faced "immediate danger" – and "identifiable, presently existing threat" to their health or safety requiring them to quit the premises.[45] Our colleague's analysis overlooks the requirement (with which he does not seem to disagree) that the conditions in question entail a degree of danger giving rise to an immediate need for employees to leave the workplace for their own protection. We fully agree with Member Devaney that an employer's failure to take reasonable safety measures in order to achieve

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[45] Thus, the issue before us is not whether there are uranium dust in the air or greensalt on the floor. The issue is whether those and other conditions that existed, in the context of the steps the Respondent did take to reduce the employees' levels of exposure to DU (such as requiring the use of respirators), reasonably would have led the employees to believe that the workplace was "abnormally dangerous" within the meaning of Sec. 502.

industrial safety norms may be evidence supporting a finding that abnormally dangerous conditions exist. We merely hold that such a failure does not, ipso facto, compel that finding.[46]

. We categorically reject our colleague's suggestion that the standard we apply here amounts to requiring employees to assume the risks of the workplace, even if those risks are the product of the Respondent's negligence. As we have stated, conditions that are already abnormally dangerous need not worsen in order for Section 502 to apply. Thus, employees who initially encounter abnormally dangerous working conditions are privileged under Section 502 to leave the workplace, in the same manner as employees whose working conditions are initially "acceptable" but later change significantly for the worse. Neither group must "accept the risks" of an abnormally dangerous workplace. In the former case, however, we would expect that employees would detect the presence of abnormally dangerous conditions within a reasonable time after they begin work, and would walk out at that point. Just what constitutes a "reasonable time" would depend on the circumstances: in some workplaces, the problem might be detected in hours (or minutes), while in others the risk posed might not become evident for days or even weeks. In this case,

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[46] Cf. *Fruin-Colnon Construction Co.*, supra, 139 NLRB at 903 ("The issue herein is, of course, not whether Respondent was 'safety conscious,' or even whether it took every reasonable or necessary safety precaution, but rather whether working conditions in the shaft were abnormally dangerous when the men refused to work therein.")

however, the TNS employees waited *months* before walking out, even though their working conditions had not materially changed. In attempting to explain how those employees could have had, for months prior to the walkout, a good-faith belief that the conditions in the TNS plant posed an abnormal and immediate threat to their very lives, and yet failed to strike until May 1, Member Devaney contends that they needed the jobs. That contention is only our colleague's unsupported surmise, and, in any, event, it fails to explain why the employees walked off those jobs, which they presumably still needed, *on* May 1. Although they were not required to accept abnormally dangerous working conditions, the fact that they *did* work, for months on end, under the same conditions they initially encountered, supports our conclusion that the objective evidence was inadequate to support a good-faith belief that those conditions were abnormally dangerous.[47]

Our dissenting colleague interprets our position as a finding that the employees acted unreasonably in attempting to persuade the Respondent to correct conditions at the plant before they walked out. Nothing could be further from the truth. Such attempts were not only reasonable, but affirmatively protected concerted activity. Our point is that, when the issue is whether employees reasonably believe that their working conditions threaten their lives and health, the longer they remain in the plant, working under those same conditions, the more difficult

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[47] Our colleague's reliance on a 1978 TDRH report to support the applicability of Sec. 502 to a *1981* work stoppage is wholly misplaced.

it is to find the existence of such a belief. Thus, it is not the employees' attempts to have conditions at TNS changed, but their failure, for months on end, to remove themselves from exposure to the existing conditions, that contributes to our finding that they did not reasonably believe they were in peril.

Our colleague also rejects the alternative means we have approved for establishing the existence of abnormally dangerous conditions – i.e., demonstrating that employees reasonably believed, on the basis of objective evidence, that their cumulative exposure to DU had reached a level at which further exposure posed an unacceptable risk of harm. He argues that because the effects of exposure to radioactive and toxic substances builds gradually and (for a time) asymptomatically, and because even experts differ in their assessments of the risks of such exposure, it is unrealistic, impractical, and unfair to require such a showing.

We do not dispute the facts on which our colleague relies, but we think his argument proves too much. Contrary to his suggestion, the test we announce today does not require employees to identify the precise moment at which their cumulative exposure reaches the immediate danger threshold. (Indeed, because the test requires neither a showing of injury in fact nor even of danger in fact, it does not require that threshold to have been reached at all.) However, employees who walk off the job because they think their cumulative exposure levels have reached the immediate danger point presumably do so on the basis of *some* factual predicate. We doubt that reasonable people would conclude that their lives or health were in

imminent danger without *some* factual basis for that conclusion. Our test requires no more than a showing that a reasonable person, in possession of the relevant objective information, would have concluded that further exposure was unnecessarily risky. Contrary to our colleague, we do not believe that this burden is unrealistically heavy.[48]

Member Devaney also portrays our analysis as unrealistically requiring employees to walk out at the precise moment when abnormally dangerous conditions are identified – no sooner and no later. Thus, he "reject[s our] interpretation of immediate [as used in *Gateway Coal*] as meaning only *now – not tomorrow but now.*" This straw-man argument is completely misplaced. Nothing in our decision can reasonably be construed as imposing such a requirement. As we have said, what constitutes a reasonable time for employees to leave the workplace depends on the circumstances. When the issue is the cumulative level of exposure to substances such as DU, it may not be clear to anyone just when the abnormal danger threshold has been reached, and employees therefore should be afforded a certain amount of leeway in forming the belief that they face abnormal danger and even in making the

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[48] Member Devaney observes that different individuals have differing risk thresholds and that each employee's length of exposure would depend on his or her hiring date. Accordingly, Member Devaney argues that we are placing an impossibly heavy burden on the General Counsel, i.e., to provide a "magic number" applicable to all employees. Our colleague misperceives the nature of the General Counsel's problem in this case, which is his failure to identify *any* cumulative abnormal danger threshold, or to show that the employees reasonably believed that any of them had exceeded it at the time of the walkout.

decision to walk out. Member Devaney thus is correct in suggesting that a day or a week would not have made any difference here. But what is at issue here is not a day or a week, or even a month. As we have found, the General Counsel has not shown that the TNS employees *ever* reasonably formed a belief that their cumulative exposures had reached the abnormal danger threshold, much less that they left the premises in reasonably short order upon forming any such belief. To the contrary, the Union announced on March 10 that the employees would walk out over safety issues on May 1 – *7 weeks later* – and that is just what they did. It simply defies credulity to suggest that the employees could have believed on March 10 that their lives already were in imminent and abnormal danger because of their cumulative exposure to DU, and yet continued to work under the same conditions, further elevating their exposure levels, for nearly another 2 months. In these circumstances, our colleague's "not tomorrow but now" argument is simply a rhetorical flourish that is without significance for purposes of deciding this case.

Member Devaney also contends that there is, in any event, enough objective evidence – including, especially, the opinions of experts in the field of nuclear health and safety – of abnormally dangerous conditions to satisfy the requirements of Section 502, despite the findings to the contrary made by the responsible regulatory agencies. We cannot agree. We believe that the findings of NRC and TDRH are significant not only as to whether abnormally dangerous conditions actually existed, but also as to whether the employees' belief was reasonable, even if based on objective evidence. In particular, the decisions

of these regulatory agencies, made after numerous inspections of the TNS facility, to allow that facility to continue operating, militate against a finding that the employees *reasonably* believed that the conditions leading to the walkout were *abnormally* dangerous.[49]

Member Devaney downplays the relevance of the findings of TDRH and NRC, the two agencies with scientific and technical expertise relevant to the issues before us. Ironically, he invokes the Board's "expertise" while noting that "experts disagree on radiation's effects, tolerable levels of exposure, when injury begins, and nearly every other aspect of occupational safety and public health in this area." In our view, the Board has no place among the experts on these subjects. In this regard, we agree with our colleague that whether the TNS employees reasonably believed that their working conditions were abnormally dangerous is a labor law question, but we disagree with his contention that it is not also an epidemiological one. In this case, the epidemiological issues are inextricably intertwined with the labor law question, because they form the basis of the employees' beliefs concerning the dangers in their workplace. The employees walked out, the General Counsel contends, because they believed that they were in danger of becoming ill or dying from cancer and/or environmental poisoning. The reasonableness of that belief is an epidemiological question if anything is.

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[49] In this regard, we reiterate the specific finding of TDRH, made less than two months before the strike, that "it appears that at the present time no crisis or [imminent] threat to health and safety exist."

In making the expert judgment required by the statute – whether when the strike began there was objective evidence that would lead a reasonable employee to regard conditions as abnormally dangerous – the Board thus properly looks to the assessments of the experts with authority under the federal regulatory scheme to monitor plants and shut down any operations within them that are unreasonably dangerous. Reasonable employees and their unions cannot ignore those experts' views. Indeed, TDRH's refusal to order the closing of the TNS plant was an objective known fact – as Member Devaney puts it, part of "what the employees themselves had to work with" – that reasonable employees would have factored into their decision concerning whether or not to strike. As we have noted, however, the Union did not seek the views of TDRH until after a strike deadline had been set, and at no time did it receive any information from TDRH that would have supported its view that conditions had reached an "abnormally dangerous" level by midnight on April 30, when the contract expired and the employees walked out.

Member Devaney further asserts that our reliance on the actions of NRC and TDRH is misplaced because employee safety is not the chief priority of those agencies. That argument is unpersuasive.

First, despite Member Devaney's protestations, it is plain that employee health and safety are important concerns of NRC and TDRH. The congressional findings underlying the Atomic Energy Act state that regulation of nuclear materials and facilities is necessary for the common defense and security *and to protect the health and safety of the public,* 42 U.S.C. § 2012 (d, e). The statute

authorizes the NRC to establish standards for the possession and use of nuclear materials to promote the common defense and security *or to protect health or to minimize danger to life or property,* 42 U.S.C. § 2201(b). Under that authority, the NRC has issued elaborate regulations designed to control the possession, transfer, and use of nuclear materials so that no individual's exposure to radiation will exceed NRC standards. 10 CFR § 20.1(b), 20.101-.105. TDRH has established similar regulations for the same purposes. See Chapter 1200-2-5 of the Division's regulations (G.C. Exh. 11). As the judge noted, the purpose of the Tennessee Radiological Health Service Act was to apply "controls and regulations to radiological safety to protect the health and well being of people in Tennessee."[50] Our colleague points to nothing in either

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[50] Although the statutes refer only to the "public" health, and do not specifically mention *employee* health and safety, employees surely are members of "the public." If Congress and the Tennessee legislature, in enacting legislation designed to regulate nuclear plants in the interest of protecting public health and safety, had been unconcerned with the health and safety of employees, we presume they would not have used a term like "the public," which otherwise would include employees, without emphasizing the exclusion. It is plain, however, that no such exclusion was intended. As the NRC's Kerr testified, when Congress enacted the Atomic Energy Act, it "determined these activities should be regulated under a system of licensing to protect the health and safety of *radiation workers* and the public. The [NRC] is now charged by Congress with this responsibility." Gore Committee Report at 242 (emphasis added). The statutes' focus on *employee* health and safety is found in the regulations' repeated references to "occupational doses." One of the meanings of that term is "in the course of employment in which the individual's duties involve exposure to radiation." 10 CFR §§ 20.3(10), 20.101, 20.102, 1200-2-3-.04 (1)(u), 12002-5-.03

the Federal or state regulatory scheme that suggests that NRC or TDRH would fail to seek closure of an abnormally dangerous nuclear facility because of any countervailing considerations. Indeed, he declines to guess at even what such competing considerations might be. Thus, his insinuation that employee safety and health are peripheral concerns of the regulatory agencies is simply not borne out by the record.

Second, Member Devaney overlooks the fact that we are not invoking the actions of NRC and TDRH as binding rules of law, but as factors the employees should have considered in assessing the risks of remaining on the job. In our view, reasonable employees should have given significant weight to the fact that TDRH never sought to close the TNS plant. They apparently did not.

We also reject the dissent's suggestion that, absent a showing that the agencies *would* have sought closure of excessively hazardous plants under certain conditions, the agencies' failure to close the TNS plant should carry no weight. In our view, when an agency is charged with protecting worker health and safety, and is garbed with the authority to seek closure of abnormally dangerous plants, the proper course is to presume that the agency *would* exert that authority if it found, on the basis of its own scientific and technical expertise, that conditions in the plant were, in fact, abnormally dangerous. That presumption could, of course, be rebutted by showing, for example, that the agency did not intend to seek closure,

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(2)(c),-.04. ("Individual" is defined, by the way, as "any human being." 10 CFR § 20.3(7); 1200-2-4-.04 (1)(q).)

or that it had a record of chronic inaction or dereliction regarding health or safety matters. No showing of either sort has been made here.

Finally, it is irrelevant that we do not know with certainty the circumstances, if any, under which TDRH actually would have sought to close the TNS plant. What is relevant is what the employees knew at the time of the walkout. Among the objective facts known to the TNS employees were that TDRH (to which the Union telegraphed on April 29, expressing concern for the employees' health) was the state agency charged with protecting the health of employees in the nuclear industry, and that TDRH had not acted to shut down the plant for any reason. For unexplained reasons, the employees apparently did not seriously consider those salient facts. There is no record evidence that the employees ignored the actions of TDRH because of any belief, objectively supported or otherwise, that that agency was not looking out for their health and safety, and would not have attempted to require their removal from a plant that it considered excessively hazardous. For the purposes of this case, then, whether or not TDRH would have tried to close the plant is irrelevant, because the employees evidently never considered that possibility in making their decision to strike.

In our view, while the objective evidence as a whole would render reasonable a belief that health and safety problems existed at the Respondent's plant, as they often do in cases involving ordinary Section 7 health and safety strikes, it would not render reasonable a belief that the conditions at the plant on May 1 were or had become so egregious as to meet the much more rigorous objective

standard of abnormal danger within the meaning of Section 502.

The fact that the opinions of certain industrial health and safety experts (which were not, in any event, a basis for the employees' decision to strike) differed from the views of TDRH does not, as our colleague would have it, mandate a different result. Two things, at least, are clear from the record in this case: the nuclear industry is inherently more dangerous than most other industries, and experts can and do differ over what constitutes unacceptably hazardous conditions in the nuclear industry. In those circumstances, it is difficult to say with certainty that there is any nuclear facility that would not be pronounced unacceptably risky by some expert. Thus, under our colleague's view, virtually any work stoppage over safety conditions in the nuclear industry could be protected under Section 502. We are not convinced that such an expansive reading of Section 502 accurately reflects congressional intent.

Member Devaney asserts that, in relying on the findings of TDRH and NRC, we are contradicting *Roadway Express*, 217 NLRB 278 (1975). In *Roadway Express*, the Board found that a truckdriver reasonably believed that one of his employer's trucks was abnormally dangerous, even though a Department of Transportation investigator had found it safe to drive. Member Devaney views *Roadway Express* as binding precedent which requires a finding that Section 502 applies to the strike at TNS. We disagree.

Roadway Express is distinguishable from this case. The Government investigator in *Roadway* made only a visual

inspection of the suspect truck; he did not drive it himself, but instead asked one of the employer's other drivers to drive it and give his opinion of the risk involved in operating the vehicle. Thus, far from bringing any agency expertise to bear on the safety question, the inspector in effect invoked the *employee's* expertise. That was not an unreasonable decision, since the danger complained of involved a jerking, twisting motion that assertedly made it difficult to hold the truck on the road, and that would be evident to one who had operated the truck and others like it. But because the investigator apparently knew nothing more about the hazards associated with driving the truck than he had been told by the second driver, there was no reason for the first driver's opinion of the truck's roadworthiness to be altered or even informed by the actions of the investigator.[51]

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[51] Member Devaney misperceives the point of distinction between *Roadway Express* and this case. It was not that the Board particularly valued the employee's instincts and expertise that prompted the Board to reject the Government inspector's expertise in *Roadway*. Rather, it was that the Government inspector did not bring to bear his own expertise, but relied wholly on that of a second employee, that enabled the Board to give little if any weight to the inspector's determination not to pull the truck off the road. Indeed, as the administrative law judge found in the previous case (*Roadway Express*, 203 NLRB 157, 159 (1973), remanded on other grounds sub nom. *Banyard v. NLRB*, 505 F.2d 342 (D.C. Cir. 1974)), the inspector inspected the truck visually and found nothing wrong with it, but refused to drive it because he was not a truckdriver, he asked a driver to drive it and to tell him what, if anything, was wrong. That fact pattern is entirely absent in this case; TDRH made the inspections itself and exercised its own expertise – not someone else's – in not closing the plant.

The contrast with this case could hardly be more pronounced. Unlike the drivers in *Roadway Express,* the TNS employees possessed no expertise whatever regarding the dangers that concerned them. Unlike a truck that can scarcely be kept on the road, ionizing radiation presents hazards that cannot be assessed or even detected by persons without technical knowledge and measurement capabilities. Thus, unlike the truckdriver in *Roadway Express,* the TNS employees depended on the expertise of others in assessing the risk of remaining on the job. In looking to the judgments of the expert agencies in this case, therefore, we are not ignoring the lessons of *Roadway Express;* we are simply recognizing the qualitative differences between the regulatory judgments called for in the two cases.

In sum, the General Counsel has failed to prove by objective evidence that the May 1 strike occurred because the employees reasonably believed at that time that working conditions were abnormally dangerous within the meaning of Section 502. Consequently, that work stoppage was an ordinary economic strike. In accord with *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345-346 (1938), the Respondent lawfully hired permanent replacements for all economic strikers. It therefore did not violate Section 8(a)(3) and (1) when it subsequently refused to reinstate replace strikers to positions held by replacements on receipt of the strikers' unconditional offer to return to work.

II. ELIMINATION OF THE PENETRATOR SHOP

As previously discussed, the Respondent resumed production in August 1981, during the continuing unit employee walkout, by hiring permanent replacements. The penetrator shop, which employed approximately 20 of the original 100 employee work force, did not reopen at this time. It remained closed even after the striking employees' unconditional offer to return to work on February 15, 1982. The judge found that the Respondent violated the Act by failing to reopen the penetrator shop and to reinstate former strikers to vacancies there at the conclusion of the walkout. We disagree.

NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967), and *Laidlaw Corp.*, 171 NLRB 1366 (1968), govern the reinstatement rights of the penetrator shop employees whose positions have remained vacant since the onset of the work stoppage. As to these employees, an employer does not violate the Act if he "sustains his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons." *Laidlaw*, supra, 171 NLRB at 1370. By way of example, *Fleetwood Trailer* noted that the burden of proof can be met by showing that jobs were eliminated for reasons unrelated to a labor dispute such as "the need to adapt to changes in business conditions or to improve efficiency." The Respondent asserts that it has met its burden of proof that the penetrator shop was not reopened for legitimate business reasons.

Prior to 1980, the Respondent's main operations were carried out in the foundry, where it produced and sold 400 and 1200-pound uranium "derbies," so named for

their rounded, hat-like appearance. In 1980, the Respondent initiated a new production process whereby the large derbies were converted into "billets." The billets were shipped to an outside facility for extrusion into rods, which were returned to the TNS plant's newly opened penetrator shop. There the rods were transformed into the "GAU-8-penetrator," an armor piercing antitank missile sold exclusively to the U.S. Air Force.

When the work stoppage commenced on May 1, the Respondent shut down the entire plant. However, production of the GAU-8 penetrator continued at Aerojet General Corporation, the Respondent's parent facility in Compton, California. Nevertheless, according to uncontradicted testimony of George Kriska, vice president of Industrial Relations at Aerojet and the Respondent's chief negotiator, within 3 months of the shutdown the Air Force began "showing more and more concern about the fact that we were potentially going out of material . . . that affected the rest of the Ordinance Company, production of the GAU-8 round of ammunition." Specifically, Kriska was referring to the uranium billet production "coming out of our TNS operation." Therefore, the Union was told on July 6 that the plant would reopen with replacement workers if the employees refused to return. However, counsel for Aerojet, Elwood Moger, made clear at a July 16 bargaining session that, "due to business reasons," penetrator production would not resume when the plant reopened. Kriska added, "we don't know when we will need requirements for additional penetrator production. Whether in the future it will

be required we don't know." Accordingly, only the foundry's billet production was resumed when the Respondent reopened in August.[52]

By not elaborating at the July 16 meeting or thereafter as to the nature of the business reasons prompting the curtailment of penetrator shop production, the judge concluded that the Respondent failed to satisfy its obligation under *Fleetwood Trailer* of justifying its refusal to reinstate the employees. Further, the judge found the business reasons for closing the penetrator shop inexplicable in light of the assertion that the alleged necessity to reopen the plant was to meet its contractual obligation of supplying penetrators to the Air Force.

We note initially that an employer's obligation of proving a business defense under *Fleetwood Trailer* is not triggered until the employees unconditionally offer to return to work. Here, that was February 15, 1982, 7 months after the July bargaining session where the Respondent gratuitously proffered what the judge described as a "bald" business reason for elimination of penetrator production. Thereafter, in its first opportunity to do so, we find that the Respondent afforded an entirely satisfactory explanation for the unavailability of penetrator work.

During a mediated bargaining session held on March 4, 1982, the Union proposed resumption of penetrator

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[52] There is no record evidence to support the judge's finding at fn. 171 that the Respondent gave as a reason for cessation of the penetrator shop that there was no need for further production of the GAU-8 missile.

work but the Respondent replied that it was not legally required to do so and reminded the Union that such work never took place during the work stoppage. The reasons, as explained by the Respondent's spokesman, Bill Earnest, were because since its inception in early 1980:

> The penetrator shop has not been a good operation. . . . It was an inefficient operation . . . [and] we [were] making an awful lot of defective penetrators. Reworked or scrapped. . . . Our quality is subacceptable. We are using way too much material. We are spending way too many man hours to produce the penetrators.

Further details of production inefficiencies in the penetrator shop were given by two of the Respondent's witnesses at trial. Plant engineer, Joe Romaine, stated, without contradiction, that the scrap rate was "considerably higher than the three and a half-four percent level that was consistently achieved at the sister plant in California. I know . . . that it reached as high as 38 percent in there a couple of weeks. Now that is a horrendous number." Production Manager, Jerome Hoynacki, explained that the penetrator shop "was designed to produce about 15,000 pieces per day, and similar to the shop in Compton, California . . . but it never came to that rate." Documentary evidence, in the form of a health inspection report conducted by TDRH during the spring and summer of 1980 notes that, since the date of Department's previous inspection, "work in the Penetrator Bldg . . . has gotten underway: aiming for 5,000 penetrators/day; however, presently producing only 1800-2000/day (low production d/t problems w/feed machine difficulties)."

Based on the foregoing, we conclude that the Respondent has sustained its burden of proving a substantial business justification for its failure to reactivate the penetrator shop and recall those employees. In so concluding we reject the judge's finding that the Respondent's discriminatory motive is shown through solicitation for advice made by its representative at the March 1982 bargaining session as to whether penetrator production should recommence. This does not detract from the business defense which has been successfully established. The Respondent's purpose at this bargaining session was to seek the Union's input on how production inefficiencies, which plagued the penetrator shop since before the walkout, might be resolved. However, the Union adamantly refused to offer suggestions unless the penetrator shop was reopened. Unable to obtain and then assess the merit of the Union's advice, we think it was quite reasonable for the Respondent not to reopen. Nor do we find unlawful motive based on the Respondent's claim that it was necessary to resume operations to meet its contractual commitment of supplying penetrators – a claim that seemed "inexplicable" to the judge in light of the fact that the Respondent was attempting to meet that commitment without opening the penetrator shop. To meet its contractual commitment, however, all that was necessary was for the Respondent to reopen its foundry and manufacture billets (for later conversion into penetrators at the Compton penetrator shop). By resuming foundry operations in August 1981, the Respondent fulfilled its contractual requirement.

Having found that the Respondent's decision not to reopen the penetrator shop was grounded on legitimate

business reasons, the failure to reinstate these employees was not a violation of Section 8(a)(3). See *Lincoln Mills Nursing Home*, 257 NLRB 1145, 1156-1157 (1981); *Bushnell's Kitchens*, 222 NLRB 110, 117-118 (1976). Accordingly, we dismiss this aspect of the complaint.

III. THE INDEPENDENT 8(A)(1) ALLEGATION

In September 1983, according to the testimony of Gary Reed, one of several employees who had been recalled to work, an official of the Respondent told a group of replacement and recalled employees that all returning "strikers" would retain their original seniority. This statement was apparently meant to correct an announcement made earlier that year to replacements that reinstated strikers would not retain their seniority. In January 1984, the Respondent repeated to employees that, contrary to earlier indications, it was required as a matter of law to recognize the original seniority of any returning striker.

The judge found that the "Respondent's efforts to cure these earlier mistakes may have succeeded in giving replacements correct information concerning their seniority, but they also were likely to breed insecurity and resentment toward those whose return would undermine the higher rank they thought they enjoyed." Concluding that the remarks "would naturally tend to fan the replacements' hostility against the reinstated strikers and the Union," the judge found that the statements violated Section 8(a)(1). We reverse.

The violation alleged by the General Counsel was not the curative remark relied on by the judge, but rather the

initial erroneous statement that replacements would have seniority superior to that of reinstated strikers. There are no exceptions to the judge's failure to find this statement unlawful. With respect to the corrective statements later made by the Respondent, even assuming that replacements would react with antipathy towards coworkers whose greater seniority had not been affected by their protected work stoppage, there is no basis for holding that an accurate statement about the legally mandated preservation of seniority rights violated Section 8(a)(1).

IV. THE REFUSAL TO BARGAIN

On May 4, 1982, the Respondent withdrew recognition from the Union. It based this action on an alleged good-faith doubt of the Union's continuing majority status after receiving a decertification petition signed by 70 of 73 current employees. The judge found that this petition was tainted by the Respondent's unfair labor practices and was therefore an invalid basis for the Respondent's withdrawal of recognition. In footnote 232 of the judge's decision, she stated, "Were it not for Respondent's unfair labor practices, I would find that the employees' petition provided a sufficient basis for a good faith doubt of the Union's majority status." In the preceding sections of this decision, we have reversed the judge's unfair labor practice findings with respect to conduct preceding the Respondent's receipt of the decertification petition. In the absence either of any alternative theory advanced in support of the 8(a)(5) refusal-to-bargain allegation or of exceptions to the judge's alternative good-faith doubt finding in footnote 232, we find that the

Respondent lawfully withdrew recognition from the Union.

ORDER

The complaint is dismissed.

MEMBER RAUDABAUGH, concurring.

I. INTRODUCTION

The plurality and the dissent disagree with each other on the issue of whether the employees had a reasonable belief, based on objective evidence, that the working conditions were abnormally dangerous. The plurality answers that question in the negative, and the dissent answers it affirmatively. I find it unnecessary to resolve this difficult issue. For, as explained below, even if the dissent is correct, I would nonetheless dismiss the complaint on the ground that there was no causal connection between the abnormally dangerous conditions (assumed arguendo) and the work stoppage.[1]

Although I do not reach the issue that divides my colleagues, I do wish to note my discomfort with the approach taken by the plurality. In my view, the first prong of their test fails to give adequate recognition to the fact that continued exposure to unsafe levels of radiation increases the danger to health with each passing day,

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[1] This concurrence concerns sec. I of the plurality decision (the Sec. 502 Issue). I agree with secs, II, III, and IV of the plurality decision regarding the dismissal of the 8(a)(1), (3) and (5) allegations discussed therein.

even if the circumstances in the plant have not become substantially worse by the time of the work stoppage. The second prong of the test is apparently designed to deal with this problem. However, that prong has its own shortcomings. That part of the test imposes on employees the burden of showing the time at which further exposure poses an unacceptable risk. Given the scientific difficulty of the question and given the employment consequences that may be attendant to a "wrong" answer, I think it fundamentally unfair to impose that burden on employees.

This is not necessarily to say that I would find that the "abnormally dangerous" test was met in this case. Nor is it to say that I embrace all the views set forth in the relevant portion of Member Devaney's dissent. However, it is to say that, in a case where causality has been shown, I would not impose unrealistic barriers concerning the "abnormally dangerous" test.

II. ANALYSIS

As noted above, I conclude that the work stoppage in this case would not be within the ambit of Section 502 even if the employees reasonably believed that the conditions in the plant were abnormally dangerous.

A work stoppage falls within the ambit of Section 502 only if, in the words of that section, the employees cease labor "because of" abnormally dangerous working conditions. Hence, there must be a causal connection between the abnormally dangerous conditions and the work stoppage. Further, the Supreme Court has said that the working conditions must be the sole cause of the work

stoppage. In this regard, the Court said that "a work stoppage called solely to protect employees from immediate danger is authorized by Section 502." (Emphasis added.)[2] Thus, even if the employees reasonably believed that working conditions are abnormally dangerous, a work stoppage does not fall within the ambit of Section 502 if the employees are acting, at least in part, for other reasons.

There are strong policy reasons for the "sole cause" test. If a work stoppage is within the ambit of Section 502, it can occur in the face of a no-strike clause and it can occur without 8(d) notices, waiting periods, and opportunities for mediation. This kind of disruption should be tolerated only in limited situations, i.e., only if it is caused solely by abnormally dangerous conditions. If the union uses that work stoppage to serve some other agenda as well, the work stoppage should be subjected to the normal rules of Section 8(d) and no-strike clauses. Further, Section 502 is a "limited exception"[3] to the general rule that a work stoppage is normally considered to be a strike. This limited exception is intended to permit employees to shield themselves from abnormal dangers without being considered to be on strike. The exception is not intended to be used as a sword with which employees accomplish other objectives.

My dissenting colleague would ignore the Supreme Court's language on the ground that it is dicta. I recognize that the language was not necessary to the holding

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[2] *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 385 (1974).

[3] *Gateway Coal*, supra at 385.

of *Gateway Coal*. In this sense, I agree that there is no binding judicial precedent concerning the test for causality under Section 502. However, particularly on issues of first impression, I do not think it prudent to ignore the Supreme Court's clear pronouncement on that very issue, even if the pronouncement was not necessary to the disposition of the case before the Court. In addition, where, as here, there are strong policy reasons which support the Court's articulated view, I think it all the more important to adopt and follow that view.[4]

My dissenting colleague misstates my position under the "sole cause" test. He asserts that I am holding that any work stoppage which occurs during contract negotiations will not be protected by the statute. As a threshold matter, I note that the issue in this case is not whether the work stoppage is protected by the statute. No one doubts that the work stoppage was protected by Section 7 of the statute. The issue is whether the work stoppage was entitled to any special protection afforded by Section 502. As to that issue as well, my colleague has misstated my position. Under my view, the mere fact that a work stoppage occurs during contract negotiations is not sufficient to remove the work stoppage from the ambit of Section 502. Concededly, during a contract hiatus period there will often be an ongoing economic dispute between the parties, and that dispute will exist simultaneously with

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[4] My dissenting colleague asserts that I rest my argument largely on policy considerations. In fact, I rest my argument on the language of the statute ("because of"), the pronouncement of the Supreme Court (sole causation), and on policy considerations.

the abnormally dangerous conditions. In such circumstances, it may well be that the work stoppage is caused by the economic dispute and by the abnormally dangerous conditions. However, it does not follow that the employees cannot thereafter seek to avail themselves of the protection of Section 502. If the union simply informs the employer that the work stoppage will terminate on the correction of the abnormally dangerous conditions even if the economic dispute is unresolved, that would appear to establish, at least prima facie, that the sole cause of the work stoppage is the abnormally dangerous condition. The employer can test the union's bona fides in this regard by cleaning up the abnormally dangerous conditions. If the work stoppage continues, it is obviously not caused by such conditions.[5]

Based on all of the above, I conclude that a work stoppage is within the ambit of Section 502 if it is caused solely by abnormally dangerous conditions.[6] I now apply that test to the facts of the instant case.

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[5] My colleague asserts that the Union sent such a letter in this case. However, the letter was sent on March 10 and it referred to a possible future strike on April 30. The letter then set forth conditions under which that possible future strike could end. However, in this case, as in most negotiations, much can happen in a period of 6 weeks. Accordingly, I would not accept the Union's March 10 letter as a substitute for a simple and clear statement of what it would take to end the strike that actually began on April 30. Such a letter, if sent contemporaneously with the start of the work stoppage, would have constituted such a statement.

[6] I recognize that a work stoppage can be an unfair labor practice strike if only one of its causes is an unfair labor practice. See *Northern Wire Corp. v. NLRB*, 887 F.2d 1313 (7th Cir. 1989). However, there is a significant distinction between the

In the instant case, the work stoppage was not caused solely by abnormally dangerous conditions of work. Rather, it was caused, at least in part, by a desire to achieve favorable results at the bargaining table. In this regard, I note that negotiations for a new contract began on March 24, 1981. Throughout the negotiations, and at the time of the strike, the parties were far apart on various issues. Some of these issues directly concerned health and safety matters. Other issues did not. With respect to the latter, the Respondent's proposals included: (1) the proposal to extend the probationary period; (2) the proposal to extend the Respondent's right to layoff employees, without regard to seniority, to 10-day layoffs, as compared to 24-hour layoffs; (3) the proposal to be able to terminate those on medical leave for more than 6 months. These proposals were opposed by the Union and were significant bargaining issues. In addition, the parties were apart on management rights, checkoff, shift

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two situations. A fundamental purpose of the NLRA is to prevent and remedy unfair labor practices. If an employer engages in serious unfair labor practices, and this unlawful conduct is a cause of a strike, it would be inconsistent with a fundamental purpose of the Act for the Board to assist the wrongdoer by permitting him to operate with permanent replacements during the strike caused, at least in part, by his own unlawful conduct. By contrast, the Board has no statutory obligation to prevent and remedy an abnormally dangerous working condition. Such a condition, however deplorable, is not within the remedial province of the Board. Hence, there is neither need nor warrant for the Board to apply the lenient test of causality applied in the unfair labor practice strike situation. As explained above, the purposes of Sec. 502 are fully served by limiting its coverage to employees who, in walking out, make clear their agreement to return once abnormally dangerous conditions are corrected.

assignments, and vacation scheduling. Finally, although there was a tentative agreement on wages, the Union continued to believe, on the eve of the strike, that the Respondent's wage increase offer was "still $2.00 low."[7]

Concededly, both before and during this bargaining, there existed conditions which I have assumed arguendo to be abnormally dangerous. Thus, the critical question concerns the cause of the work stoppage. Was it caused (1) solely by a concern that further exposure to the conditions in the plant would pose unacceptable risks of present or future bodily harm; or (2) at least in part by a desire to achieve a satisfactory collective-bargaining agreement?

I conclude that the work stoppage was caused, at least in part, by the latter factor. In this regard, I note particularly that the work stoppage did not occur until April 30, the contract expiration date. This was the date that the employees would be free to strike with respect to all bargaining table issues. I also note that, on March 10, the Union threatened the strike of April 30. Assuming arguendo that there were abnormally dangerous conditions on March 10, they obviously did not cause a work stoppage on that day. Nor did conditions worsen between March 10 and April 30, such that a work stoppage on the

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[7] I find no support for my dissenting colleague's observation that the Union's statement was "ironic in import." The Union thought that the Respondent's wage offer was designed to "buy off" the employees on the health and safety issues. However, the Union thought that the offer was "still $2.00 low." I am not suggesting that the wage issue was a decisive one in the bargaining. I merely point out that it was another bargaining issue separating the parties.

latter date might be caused by plant conditions. Rather, the only thing that happened between March 10 and April 30 is that the parties were unable to reach an agreement by the latter date.

Based on the above, I conclude that the work stoppage was caused, at least in part, by a desire to achieve a satisfactory collective-bargaining agreement, rather than solely by a reaction to abnormally dangerous conditions in the plant. In response, the dissent makes two points: (1) the judge found that the employees voted to strike because they believed that abnormally dangerous conditions at the plant were endangering their health; (2) even if the work stoppage was aimed at achieving a collective-bargaining agreement, most of the bargaining issues in dispute related to health and safety. I now turn to each of these contentions.

With respect to the first point, the judge found that "the overwhelming weight of the testimony establishes that the employees rejected the Respondent's final proposal and voted to strike because they believed that the working conditions at TNS were endangering their health." This finding was based on the credited testimony of various striking employees. I do not quarrel with the judge's credibility resolutions. However, I do not believe that the cause of a strike is to be determined solely on the basis of subjective testimony given by various striking employees long after the events in question. Rather, I believe that the objective facts, extant at the time of the work stoppage, are entitled to more weight. As discussed above, those facts show that there were substantial bargaining issues on the table at the time of the work stoppage. The union called the work stoppage to accomplish

its bargaining objectives and, perhaps, to protest the alleged abnormally dangerous conditions. In these circumstances, I do not believe that the General Counsel, by reliance on subjective testimony, has established that the work stoppage was caused solely by the abnormally dangerous conditions.

With respect to my colleague's second contention, I note that he concedes, as he must, that at least some of the bargaining issues in dispute were not related at all to health and safety. Further, even the health and safety issues were not of such a character as to support a conclusion that the work stoppage was within the ambit of Section 502. In this regard, I respectfully disagree with my dissenting colleague's apparent view that if a union makes a health and safety proposal, in the context of an abnormally dangerous condition, a work stoppage in support of that proposal will necessarily be within the ambit of Section 502. Section 502 is designed to protect employees who engage in a work stoppage because of a legitimate concern that further exposure to abnormally dangerous conditions would pose unacceptable risks of bodily harm. Hence, if employees engage in a work stoppage to escape these conditions, the work stoppage is protected by Section 502. Further, if a union makes proposals designed to bring about an immediate correction of these conditions, a work stoppage in support of these proposals would still be consistent with Section 502. On the other hand, if the Union makes health and safety proposals which do not address the abnormally dangerous conditions or which would address them only in the future, a work stoppage in support of these proposals would not be within the ambit of Section 502. For, in

those situations, the work stoppage can end if the proposals are accepted, even though the abnormally dangerous conditions remain.

Perhaps the best example of the above situation can be seen in the instant case with respect to the subject of respirator usage. Assuming arguendo that abnormally dangerous conditions existed and that the use of respirators was one of those conditions, the Union's proposal to end such usage, a key demand in the negotiations, would not take effect until many months later. That is, the work stoppage could end even if an abnormally dangerous condition persisted. To this extent, at the very least, the work stoppage was not aimed at the immediate abolition of abnormally dangerous conditions.

Similarly, even if the proposal regarding layoffs was related to health and safety, it was not aimed at the immediate abolition of the abnormally dangerous condition. If the Respondent acceded to the Union's bargaining position, employees would not be laid off because of toxic conditions. But this would not eliminate the toxic conditions.

I agree with my dissenting colleague that some of the Union's proposals were designed to remove the immediate danger. However, other proposals, although dealing with health and safety, were not designed for this purpose (e.g., the proposal regarding respirators). And, still other proposals did not deal with health and safety at all (e.g., vacation pay, shift assignments, and checkoff). In such circumstances, the Union can enjoy Section 502 protection by making it clear that its work stoppage is only

for the first purpose stated above, i.e., removal of immediate danger. This is not to say that the Union must drop its other goals. Nor is it to say that it cannot engage in a protected work stoppage for these other goals. I simply say that such a work stoppage is protected only by the broad provisions of Section 7 and not by the narrow protections of Section 502.

In short, even though some of the Union's proposals dealt with safety and health, they were not sufficient to place the work stoppage in support of these proposals within the ambit of Section 502. This is not to denigrate these proposals. They are mandatory subjects of bargaining and were advanced in good faith. Thus, a work stoppage in support thereof is an economic strike protected by Section 7. But it is only that.[8]

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[8] *Combustion Engineering,* 224 NLRB 542 (1976), cited by my colleague, is quite consistent with my view. If the employer there removed the dangerous condition (the existence of drunk and belligerent coworkers), the work stoppage would come to an end.

My dissenting colleague says that the danger in *Combustion Engineering* was qualitatively different from that in the instant case. Assuming that this is so, I fail to see the relevance of the distinction. The significant point is that the abnormally dangerous condition in that case was the sole cause of the work stoppage. The issue is not the type of abnormally dangerous condition but rather whether that condition is the sole cause of the work stoppage.

My colleague also relies on *Knight Morley,* 116 NLRB 140 (1956). Without getting into a discussion of the several differences between that case and the instant one, suffice it to say that the case was decided before the Supreme Court articulated the "sole cause" test in *Gateway.* Contrary to the suggestion of my colleague, there was no reason for the Supreme Court in

Based on all the above, I am not persuaded that the General Counsel has established that abnormally dangerous conditions were the sole cause of the work stoppage. Accordingly, I conclude that the work stoppage was not covered by Section 502.[9]

MEMBER DEVANEY, dissenting.

1. Introduction

I dissent from the dismissal of the complaint. I would find that TNS violated Section 8(a)(3) and (1) by refusing to reinstate the employees who walked out of the TNS plant at midnight on April 30, 1981.[1] Today, my colleagues post notices to employees facing dangers from

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Gateway to say that *Knight Morley* was incompatible with its decision. The decision in *Knight Morley* speaks of the reason for the work stoppage, language that is wholly compatible with the "sole cause" test of *Gateway*.

[9] Although the Supreme Court used "sole cause" language, I leave open the possibility that a work stoppage could be protected by Sec. 502 if it is caused almost entirely by abnormally dangerous conditions, i.e., the other causes are de minimis. For the reasons discussed above, I do not think that the work stoppage herein meets this test.

[1] Unless otherwise noted, all subsequent dates in the months January through July are in 1981 and all dates in the months August through December are in 1980.

The judge also found that the Respondent violated Sec. 8(a)(1) by telling its work force that the employees who engaged in the work stoppage would not be reinstated with seniority rights, violated Sec. 8(a)(3) with respect to the failure to reopen the penetrater shop, and violated Sec. 8(a)(5) and (1) by refusing to bargain with the Union after October 29, 1982. I would adopt these findings.

slow-acting toxins or radioactive substances. The plurality, Chairman Stephens and Member Oviatt, warns: If you face exposure to toxins causing injuries that are not readily apparent, do not look to the Board; the level of proof required to invoke Section 502 puts protection beyond your reach. My concurring colleague, Member Raudabaugh, warns: If you cease work because of abnormally dangerous conditions, time your walkout carefully. If it occurs during contract negotiations, the statute will not protect you. And all of my colleagues tell employees: Even if you time your walkout properly and establish every factual showing we require, you still may risk the loss of your job through permanent replacement – the Board does not decide that issue here. Both the plurality and the concurring views impose arbitrary and unreasonable standards which deny employees the protection of the statute.

Both views pay only lip service to the principle, explicitly articulated by the plurality, that Section 502 protects employees from abnormal dangers resulting from slow-acting radioactive or toxic substances. Given the opportunity to bring the Board's expertise to bear on life and death issues, my colleagues have chosen, in both their analyses, to craft hypertechnical standards that ignore the realities of today's workplace. Both the plurality and the concurrence render the statute a nullity to employees working with radioactive or toxic substances because the dangers they face, and their efforts to deal with those dangers, do not correspond to traditional notions of workplace safety.

I emphasize that the Board is writing law on a clean slate today. Neither the plurality nor the concurring view

is inherited from an earlier, less enlightened Board, mandated by legislative history, or derived from clearly articulated Board or Supreme Court rules of law. Rather, although my colleagues work hard to make their separate results appear determined by binding precedent, this is a case of first impression. In such cases, the Board should look for guidance to the intent of Congress as evidenced in the language of the statute, at binding Board and Supreme Court precedent where they exist, and at congressional intent underlying the labor laws as a whole. Such an inquiry strongly supports adopting the judge's findings that TNS violated Section 8(a)(3) by failing to reinstate the employees when they offered to return to work.

My colleagues follow different routes to a very different destination. Where the legislative history of the Taft-Hartley Act is silent with respect to Section 502, the plurality points to congressional debate over prior defeated legislation as support for its result. Where no binding Supreme Court case directly speaks to the application of the statute to the facts here, both the plurality and the concurring opinion dress up the Court's comments on mooted issues in *Gateway Coal Co. v. Mine Workers*[2] as the holding of the case and black letter law. Where Board law is silent with respect to the application of Section 502 to cases involving slow-acting toxins, my colleagues in the plurality cobble together statements from cases with clearly distinguishable facts into "precedent." An examination of the plurality's "precedent" in context, however, exposes it as merely a vehicle for a

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[2] 414 U.S. 368 (1974).

result dictated by unstated policies which, in my view, are clearly incompatible with the underlying purposes of the Act.

Thus, Supreme Court and Board precedent provide no basis for the plurality and concurring opinion positions that the 8(a)(3) allegations must be dismissed; moreover, both positions ignore the conflicts between their respective analyses and case law. In contrast to the plurality, prior cases have not provided employers that require employees to breathe, eat, and wash in uranium dust – unnecessarily and preventably – with legalistic rules tailor-made to exclude employees from Section 502's coverage. In contrast to the concurrence, prior cases have not set a causality standard so restrictive that the mere simultaneity of a walkout with ongoing negotiations is sufficient to remove the statute's protection – particularly where the employees successfully demonstrate that their belief in abnormally dangerous conditions was based on objective evidence. And contrary to both positions dismissing the 8(a)(3) allegations, prior cases set no precedent for denying Section 502 coverage to employees reduced to cleaning improperly equipped respirators in buckets of contaminated water because they presented their employer with an opportunity to correct the overexposure to toxins they believed put them in abnormal danger. I do not believe that when Congress excepted work stoppages for abnormally dangerous conditions from the definition of strikes, it contemplated that a walkout satisfying the statute's requirements would lose protection simply because a state regulatory agency failed to act to close the facility down, or because it

occurred during contract negotiations – yet my colleagues so hold today.[3]

2. Permanent replacement and Section 502

I would reach a different result, in both law and policy, on the clean slate before the Board today. With respect to the law, the appropriate judgment is to adopt the judge's finding – based on findings of fact and credibility resolutions that neither the plurality nor the concurrence disputes – that TNS violated Section 8(a)(3) and (1) by failing to reinstate the employees who engaged in a work stoppage protected by Section 502 and that it is obligated to reinstate them. With respect to labor policy, the appropriate choice is to ensure that employees' job rights are protected when they leave their jobs because they have a reasonable belief, based on "ascertainable, objective evidence that an abnormally dangerous condition for work exists."[4] This result and this policy choice

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[3] The plurality states that my disagreement with it boils down to our interpretation of the evidence: I conclude that the employees walked out in response to abnormally dangerous conditions; they conclude that the employees did not reasonably believe such conditions prevailed. My disagreement with the plurality goes far beyond this difference. In my view, the plurality looks at the facts here through antiquated lenses. As I discuss below, their analysis would work very well if the TNS employees had faced an emergency, such as an imminent explosion, but it simply will not work where the novel nature of the threat the employees faced differs so profoundly from those in earlier cases that a new, more flexible approach is required.

[4] *Gateway Coal Co. v. Mine Workers*, supra fn. 3, 414 U.S. 368, 387, quoting 466 F.2d 1157, 1162 (4th Cir.) (Rosenn, dissenting).

are fully consistent with precedent and with the purposes underlying the labor laws.

The National Labor Relations Act grants employees the right to engage in a work stoppage in support of economic demands or for noneconomic reasons, e.g., in response to an employer's unfair labor practices or because of abnormally dangerous conditions in the workplace. With respect to the right of employees to strike over economic demands, Congress and the Supreme Court have balanced that right with a corresponding economic right of employers: to keep the business running by replacing striking workers.

Thus, *Mackay Radio*[5] acknowledges that an employer faced with an economic strike has a legitimate interest in operating his business during that strike. In essence, the parties are engaged in economic warfare during an economic strike, and the law currently balances their weaponry: the employees can use the strike as an economic weapon, but the employer can defend itself by continuing to operate through hiring permanent replacements.[6]

However, neither the Board nor the courts have ever applied the *Mackay* principle beyond the narrow confines of an economic struggle. For example, if employees are engaged in an unfair labor practice strike, the *Mackay* principle does not apply. When employees engage in a

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[5] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

[6] Legislation to overturn *Mackey Radio* was introduced in the 102d Congress and is expected to be reintroduced with the beginning of the 103d Congress in January 1993.

work stoppage caused in whole or in part by the employer's unfair labor practices, the strike is not an economic weapon; therefore, the employer cannot bring its own economic weapons to bear on the strikers by hiring permanent replacements. Moreover, since the employer's own unfair labor practices have fostered the strike, permitting the employer to permanently replace striking employees would clearly be inequitable. Thus, in contrast to the economic strike, where an employer serves its legitimate economic interests if it chooses to replace strikers, in an unfair labor practice strike the employer has no legitimate interest in perpetuating its own unlawful conduct.

For the same reasons, the employer's right to wield economic weaponry as set forth in *Mackay* should not extend to a Section 502 work stoppage. When employees quit the workplace because they believe that abnormally dangerous conditions prevail, they are not using the work stoppage as an economic weapon. Rather, they are forced out of the workplace by abnormally dangerous conditions. Indeed, the case for protecting such employees against permanent replacement is even stronger when the workout is over abnormally dangerous conditions than when unfair labor practices have caused or contributed to a strike. In the former situation, the employees leave the workplace for fear of injury or death. In the latter situation, although the unfair labor practices are abhorrent to the employees and the NLRA, they do not threaten the very health of the employees.

Finally, the policies underlying Section 502 itself are best served by protecting employees engaged in a Section 502 walkout from permanent replacement. Section 502

provides that the quitting of labor by employees because of abnormally dangerous working conditions shall not be deemed a strike. Thus, although its legislative history is scanty,[7] Section 502's broad and positive language establishes one basic and profoundly significant fact: a Section 502 work stoppage is not an economic action; therefore, in contrast with an economic strike, no basis for a balancing test exists when employees walk off the job over abnormally dangerous conditions, because the express language of Section 502 states that this type of work stoppage *is not a strike.* Thus, in enacting Section 502 Congress elevated the right of employees to work free of abnormally dangerous conditions above their interests in other terms and conditions of employment. In further contrast to economic strikes, neither Congress nor the Supreme Court has created an equivalent employer right to be balanced against the right to a workplace free of

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[7] The plurality has spun a "legislative history," from a few remarks made in connection with a completely different earlier piece of legislation, the Case bill, which was vetoed after passage by President Truman and which differed in numerous respects from the Taft-Hartley Act. The plurality's exposition of the Case bill in fn. 26 and related text discusses its relationship to Sec. 502. The plurality's analysis there inadvertently but clearly demonstrates how little basis exists for interpreting Sec. 502 as if it were the Case bill.

Reliance on congressional comments made about other legislation, and thus plainly irrelevant to the statute at issue, is improper – and jurists have not hesitated to say so. Congress conveys its directions in the Statutes at Large, not in excerpts from the Congressional Record, much less in excerpts from the Congressional Record that do not clarify the text of any *pending* legislative proposal." *Begier v. IRS*, 496 U.S. 53, 68 (1990) (Scalia, concurring) (emphasis added).

abnormal dangers. Indeed, it would be folly to balance the right of employees to be free of abnormally dangerous working conditions against the right of employers to maintain abnormally dangerous workplaces, just as, in the context of an unfair labor practice strike, it would be folly to balance the right of employees under the Act to be free of employer interference, coercion, or restraint against an employer's "interest" in interfering with, restraining, or coercing its employees' exercise of their rights. It follows, then, as the court observed in *Clark Engineering v. Carpenters*,[8] that "[w]hen a work stoppage properly results from abnormally dangerous working conditions, an employer cannot resort to the weapons available to him in an economically-motivated work stoppage" – including permanent replacement.

Under these principles, there can be no question that, if Section 502 is applicable, the statutory right of the TNS employees to cease work in the face of abnormally dangerous working conditions must outweigh TNS's interest in operating the plant with permanent replacements.

3. The plurality's test for abnormally dangerous conditions: Has the General Counsel demonstrated that the TNS employees had a reasonable belief, based on ascertainable, objective evidence that an abnormally dangerous condition for work exists?

I answer this question with a resounding YES! In my view, the judge correctly found that Section 502 applies to

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[8] 510 F.2d 1075, 1080 (6th Cir. 1975) (citations omitted).

the work stoppage here. I find the plurality's opposite result inconsistent with the factual record, with case precedent, and with the realities of the workplace.

The plurality concedes that Congress intended that Section 502 apply to dangers from substances causing injuries that are hidden for decades, and that the General Counsel need not demonstrate that employees are already symptomatic to show that Section 502 protects their work stoppage. Indeed, on its face, the plurality's test for coverage under Section 502 – that employees must show a reasonable belief, based on objective evidence, that remaining in the workplace would expose them to abnormally dangerous conditions[9] – is sound, and, if this test were properly applied to the facts here, I too would subscribe to it.

I part company with the plurality, however, because its analysis silently nullified Section 502's application to dangers not directly comparable to their "mine disaster paradigm."[10] I disagree with the plurality's self-contradictory assumption

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[9] However, I interpret the phrase "remaining in the workplace" differently from Chairman Stephens and Member Oviatt. They appear to believe, based on their reading of *Gateway Coal*, supra fn. 2, that the abnormal danger must force employees to flee for their very lives. As I show below, such an interpretation is inconsistent with their finding that Sec. 502 applies to dangers causing delayed injuries and reduces the complexities of industrial life to melodrama.

[10] The plurality's "paradigm," which blinds it to the statute's applicability in nonemergency situations, is simply a fiction. The legislative history of the Taft-Hartley Act makes no reference whatsoever to a "mine disaster paradigm," nor, for that matter, to a mine disaster, or even a mine. See fn. 7, supra.

that Congress and the Supreme Court intended Section 502 to be applicable to slow-acting toxins, *but only when* employees make the same factual showing required of employees facing emergency dangers such as runaway rail cars or sudden bad weather: that the danger require that they abandon the workplace in haste at the moment the abnormal danger occurs.

In failing to realize that the analysis developed in earlier cases, in which employees faced threats with immediate, tangible consequences, will not transfer directly to the subtler, more insidious threat addressed here, the plurality bars employees facing such dangers from the statute's protection even as it announces that the statute applies to them. In reality, employees facing future illness or injury are situated differently than employees dealing with malfunctioning equipment, a runaway boxcar, or the like. While there is very little ambiguity about a boxcar on the loose, employees facing dangers from overexposure may not know how to interpret sometimes confusing or contradictory technical data and how best to balance their own safety against their need to make a living. They may, as did the employees at TNS, slowly realize that they are in danger, they may realize their danger despite assurances by their employer that no danger exists, as did the TNS employees, and they may try to persuade their fellows to join them in an effort to take effective action. They may fear unemployment, and the consequent inability to take care of those who depend on them, nearly as much as they fear cancer or kidney failure.

Chairman Stephens and Member Oviatt state that they cannot comprehend how the TNS employees could

have had a good-faith belief that conditions in the TNS plant posed an abnormal and immediate threat to their lives for months before the workout, and still have continued to work in the plant until the May 1 work stoppage. The answer is simple. They needed the jobs.[11] The

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[11] The plurality is skeptical as to the accuracy of this observation. A look at the TNS employees and their circumstances should convince anyone that the pressure of very real economic necessity made fear of job loss a paramount concern for them. None of the employees had more than a high school education; many had not gone that far in school; a few were virtually illiterate. See Tr. at 8998(a). The record shows that many employees were so afraid that they were being poisoned by the toxins at TNS that they wanted to walk out before April 30, but fear that they would lose their jobs restrained them.

My disagreement with the plurality on this point comes down to this: the plurality maintains that the TNS employees did not act like reasonable people would act if they were in an abnormally dangerous situation. I believe that the TNS employees did not act unreasonably in trying to assure that they could get the conditions they feared corrected and still hold onto their jobs. In its implicit acknowledgement that employees should not be forced to choose between a job and freedom from abnormal danger, Sec. 502 also acknowledges that employees in fact have had to make such choices; nothing in the statute forecloses the possibility that under many circumstances, employees will be forced to choose the job rather than their safety. The plurality, not Sec. 502, defines appropriate employee response to abnormal danger so narrowly and so arbitrarily that efforts to get TNS to right conditions in the plant and allowing TNS time to do so provide a basis for its conclusion that the employees did not reasonably believe that abnormal danger existed. The employees should not be penalized for trying to exhaust other avenues before walking out. Yet that is what the plurality does, by branding their so-called delay – during which efforts were made to negotiate a solution to the problems at the plant – as unreasonable.

employees tried, through Bettis' ultimatum, to give their employer one last chance to remedy the abnormally dangerous conditions. It is disingenuous to assert that "reasonable people" would not continue to work in a plant they believed to be abnormally dangerous; therefore, if these individuals continued to work in such a plant, one must conclude, as the plurality does, that "the objective evidence was inadequate to support a good faith belief that those conditions were abnormally dangerous." This oversimplification ignores the facts found by the judge as to the employees' struggle over months to decide what course to take with respect to their fears of overexposure.[12]

Further, the plurality treats the 7 weeks between Union President Bettis' March 10 ultimatum that the

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[12] See ALJD infra at 80-86.

The Board has not always failed to view employee behavior in light of employees' need to get dangerous conditions rectified while taking as few chances with their employment as possible. In *Knight Morley Corp.*, 116 NLRB 140 (1956), enfd. 251 F.2d 753 (6th Cir. 1957), cert. denied 357 U.S. 927 (1958), the Board upheld a finding that employees who walked off a job because of the malfunctioning of a ventilator were protected by Sec. 502 even though employees from other sections finished out the shift without complaint, the next shift worked with no change in conditions, and the employees who engaged in the walkout returned the next day to go to work. Under the plurality's view that "no reasonable person" would continue to work when conditions were abnormally dangerous, the employees who walked out in *Knight Morley* should not have been protected, as other employees, presumably reasonable people kept on working. The Board took note of testimony that the next shift of buffers kept on working through the dirt and heat because they were afraid they would be fired. Id. at 144.

employees would stop work over safety on April 30 and the April 30 walkout as if the employees had waited 7 years. In my view, 7 weeks is not an unreasonable time to allow an employer to correct basic safety conditions. The plurality's exaggeration of this length of time has the effect of penalizing the TNS employees for trying to get their concerns about overexposure addressed without a walkout.[13]

Nor does the plurality's claim that its test allows for circumstances where abnormally dangerous conditions are present from the time when employees begin work

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[13] The very questions the plurality raises with respect to the actions of the Union and the TNS employees indicate its failure to grasp the meaning of slowly developing dangers and how employees who face such threats grapple with the issues such dangers raise: Why did the employees not consult TDRH before walking out? Why did the employees consider striking in October-November 1980, but allow the Union to dissuade them? Why did they choose May 1 to strike when the plant was just as dangerous at other times? Such questions would be highly relevant to a situation in which employees were faced with dangers that might strike them down at any moment. See, e.g., *Philadelphia Marine Assn.*, 138 NLRB 737 (1962), enfd. 330 F.2d 492 (3d Cir. 1964), cert. den. sub nom. *ILA v. NLRB*, 379 U.S. 833, 841 (1964) (employees feared being struck by falling cargo). None of these questions, however, is directly relevant to the question of whether TNS employees reasonably believed that day by day, shift by shift, their chance at living a healthy life was diminishing. Further, each of the questions the plurality finds so telling can be answered plausibly without endangering a finding that the employees believed they were being subjected to grave dangers: a brief delay would not necessarily make a difference; TDRH had visited the facility before and no real improvement had resulted; where other economic opportunities are few, employees hesitate to walk off their jobs.

indicate that the test is genuinely adaptable to varying circumstances. In such a case, the plurality would allow a "reasonable time" for employees to quit the workplace. But employees had better act quickly, as the plurality states that "employees would not stay long" under such conditions. Employees should take further heed from the plurality's conclusion, in the first Board case presenting the issue of the timing of the employees' response to danger, that the 7 weeks between the union's ultimatum and the walkout (or, as the plurality phrases it emphatically elsewhere, "*months*") was unreasonable. This bodes ill for employees in comparable situations, as the plurality never explains by what measure the 7 weeks is too long. What is more, the plurality still does not address the situation of employees who realize over time that their exposure is excessive and are unsure how to coordinate a response.

The plurality builds its "flee for their lives" approach of this first alternative on three supports: first, the "mine disaster paradigm" it claims inspired Section 502; second, the Court's use of the terms "immediate danger" and "identifiable, presently existing threat"; and third, Board precedent applying the first two. It views these foundations as mandating that employees flee their workplace now as opposed to tomorrow or next week, to qualify under Section 502. This is a leap of logic I cannot make. As noted above, no "mine disaster paradigm" exists in the Taft-Hartley Act's legislative history. As Justice Douglas stated in dissent in *Gateway Coal*, "there is nothing in its legislative history to shed light on its purpose"[14]

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[14] 414 U.S. 368 at 391.

Further, I disagree with the plurality's interpretation of the word "immediate." I think it clear that the Court meant by an immediate danger a nonspeculative presently existing one, as opposed to the type of illusory dangers that the Court majority illustrated in its example of an employee's doubt of a supervisor's competence.[15] I reject the plurality's interpretation of *immediate* as meaning only now – *not tomorrow but now.*[16]

Thus, the plurality's emphasis on the passage of time between Bettis' ultimatum and the work stoppage follows from its failure to comprehend the difference between long term, slow-acting hazards and immediate hazards, such as those earlier cases have presented the TNS employees' efforts over many months to get plant conditions changed works against a conclusion that they reasonably believed that they were in abnormal danger *only if* abnormal danger is limited to emergency conditions and their responses are compared to those of employees in emergency conditions. Nothing in the statute limits its reach to emergencies; however, despite their assertions to

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[15] Id at 386.

[16] The plurality refers to my analysis of the timing issue as a "straw man" argument, it is anything but that. The *true* "straw man" in this case is the majority's fictional "mine disaster paradigm." As I stated above, it is only by reference to this fictional "legislative history" that the TNS employees' wait to walk off for a response from their employer to their ultimatum is anything but eminently reasonable and responsible. Similarly, my criticism of their "not tomorrow but now" interpretation of *Gateway Coal* "immediate danger" is no rhetorical flourish. The plurality has chosen the narrowest possible meaning of the word "immediate" and applied it to facts requiring a more flexible approach.

the contrary, the plurality's analysis, based on its fictitious "mine disaster paradigm," is distorted by arbitrary and self-imposed boundaries not derived from Section 502 itself.

The plurality's test suffers from other flaws. As to the first prong, the plurality arbitrarily establishes prewalkout prevailing conditions at TNS as the sole standard for distinguishing "abnormal" from "normal" dangers. This false first step is based on the plurality's unsupported premise that "abnormally dangerous" does not turn on a standard degree of deviation from a single norm of industrial safety." This test means, in effect, that the plurality need not address conditions as they actually were at TNS; the plurality need only compare prewalkout conditions with the usual state of affairs at the plant and find no significant decline – regardless of the real level of danger in the plant. Moreover, the plurality's reasoning presupposes that employees working in dangerous plants assume the risks of the workplace – even those caused by employer neglect. This idea has long been rejected and is incompatible with Board and judicial precedent and with the purposes of the Act.

a. *The plurality's first alternative: Have employees shown that they reasonably believed, on the basis of objective evidence, that inherently dangerous conditions changed substantially for the worse immediately before the walkout?*

Chairman Stephens and Member Oviatt find that the TNS employees failed to show that their belief that they worked under abnormally dangerous conditions had an

objective basis because they cannot demonstrate that conditions at TNS became "significantly worse" immediately before the walkout. Notwithstanding the judge's description of the nightmarish conditions before the walkout and TNS's intransigent refusal to correct them, the plurality holds that TNS's *own practices* are the sole benchmark for determining whether the protested conditions were "abnormally dangerous." Even assuming that this standard is legitimately derived from binding precedent, which it is not, it simply does not work in cases like this one, where employees will be required to demonstrate a significant decline in *already unacceptable* conditions. Thus, the plurality's first alternative sets up a perennially sliding scale for Section 502 protection when applied to employers that expose employees to unnecessary risks. In effect, the more reprehensible the employer is, the less protection the employees have. At some point conditions could no doubt get so close to the bottom that a dramatic drop from the "normal" is no longer possible.[17]

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[17] The plurality states that "the crux" of the judge's conclusions, and mine, is the concern that TNS did not take corrective measures "in reaction to governmental directives and a substantial body of scientific opinion indicating a direct incremental correspondence between DU [depleted uranium] levels and the incidence of cancer or kidney damage." The plurality is half right: the ignored governmental directives and the scientific opinion directly linking over-exposure to DU to kidney disease and cancer do constitute the "crux" of the judge's conclusions, and of mine as well. The plurality's only mistake is its erroneous impression that either the judge or I reach the conclusion that abnormally dangerous conditions prevailed at TNS *solely because* management there did not take the necessary measures to bring the facility up to industrial norms. A fair reading of my opinion and the judge's decision dispels this impression.

The plurality offers no justification for such a standard. No binding Board or judicial precedent supports its theory. The plurality cites one case, *Anaconda Aluminum Co.*,[18] to support using an employer's idiosyncratic practices as the benchmark for differentiating "abnormal" dangers from "normal" or acceptable ones, and claim to follow "the Board's" reasoning there.[19] In reality, the plurality cites dictum of the administrative law judge, inapplicable here because the employer in *Anaconda* had, in the judge's view, taken all reasonable steps to ensure employee safety.

In *Anaconda*, the discharged employee[20] balked at performing a hazardous routine job after its most dangerous phase had ended; the judge found that the procedure in use when the refusal occurred "was an acceptable one when viewed from the standpoint of

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[18] 197 NLRB 336, 384 (1972).

[19] I note that *Anaconda* has been cited for the principle at issue here in only two cases, and both are distinguishable from this case. In *Baker Marine Corp.*, 258 NLRB 680 (1981), an employee, upset by the death of a coworker from unrelated causes, exhorted his coworkers to refuse to climb into " 'eagles' nest" derricks, in which small fires were common and harmless, unless exits were increased. An OSHA check on that very point had found egress adequate; in addition, the employees' union begged them not to quit work. In *Custodis-Cottrell, Inc.*, 283 NLRB 585, 589 (1987), the Board found that objective evidence did not support employees' subjective fear that rain and lightning increased the danger inherent in the work. The judge discredited employee testimony about the physical dangers and noted that the employer had in fact permitted employees to leave the area where the rain was falling.

[20] The judge also concluded that dishargee Nicholls was not acting in good faith, but did not rely on this finding.

safety"[21] and that further safety options were available to and ignored by the dischargee. The judge concluded that "a known but acceptable degree of danger" existed, with no unusual danger to employees. Thus, the judge's comment in *Anaconda* that Section 502 is not activated "merely because employee patience with prevailing conditions wears thin or their forbearance ceases" was made in the context of ample evidence of thorough safety precautions. It provides no precedent for a case like TNS, where the employees' awareness of a hazard develops over many months and the "prevailing conditions" are plainly unacceptable from the point of view of safety.[22]

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[21] Id. at 344.

[22] Other Board and judicial cases are equally unavailing to the plurality. No case supports the theory that, regardless of the conditions of the workplace, the benchmark for "normal danger" is the immediate employer's practice. Other Board cases in which the Board has refused to find "abnormally dangerous conditions" are, like *Anaconda*, fully distinguishable from this case. In each case the employer, while conducting a business involving jobs dangerous by their very nature, exercised due diligence in safeguarding the health of employees. *See L. E. Meyers, Co.*, 270 NLRB 1010 (1984) ("dusting" of snow on horizontal beam did not constitute abnormally dangerous condition; work always hazardous but employees were able to brush snow away and use safety belts); *NLRB v. Fruin-Colnon Construction*, 330 F.2d 885 (8th Cir. 1964) (where work inherently perilous, employer instituted measures to protect employees; employees were protected from each hazard cited by General Counsel and had worked through more severe conditions prior to walkout). These cases simply do not involve the consistent neglect of rudimentary safety precautions such as the judge found here. They do involve, and I endorse, a realistic deference to the necessities of performing dangerous work – where additional precautions would not make the work safer. See *Daniels*

The plurality's refusal to weigh the evidence as to the level of danger present at TNS when the work stoppage occurred is all the more puzzling in light of the findings by virtually every regulatory or expert entity that examined the operations at TNS that conditions were dangerously substandard. The National Institute of Occupational Safety and Health (NIOSH) found, for example, that between 1978 and 1981, 32 percent of the work force had a yearly dose of radiation to the lung that represented an inadequate margin of safety for employees. TNS itself viewed the operations as unacceptably hazardous to employees. TNS Representative Richard O'Brien admitted to the House Subcommittee on Investigations and Oversight of the Committee on Science and Technology (Gore Committee) that safety conditions at TNS when negotiations were going on were "substandard," that TNS management had internally admitted that "the Union really was right, then that you [i.e., TNS] weren't really doing the job you should with respect to health and safety" and that, although an ALARA program[23] had started at TNS before the walkout, the facility

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Construction Co., 265 NLRB 770 (1982) (task of cleaning waste pipe at nuclear plant inherently dangerous; employer provided equipment, training, and precautions to minimize hazards; no evidence that the task could be made any safer).

[23] ALARA stands for "as low as reasonably achievable." In 1971 Nuclear Regulatory Commission (NRC) amended its standards to require nuclear licensees to try to keep radiation exposure to that level. ALARA standard is based on the assumption that no dose of radiation, however low, is without risk.

NRC delegated its statutory oversight authority with respect to aspects of employee safety related to radiation to the

was not successfully following the principle at the time of the walkout.[24]

In addition, the plurality's refusal to consider the evidence that TNS's practices deviated significantly from accepted industry standards and that TNS had not taken rudimentary precautions to protect employees from unnecessary hazards has negative consequences for employers as well as employees. Under the plurality's analysis, TNS is the type of employer afforded the fullest protection: an employer that ignores basic safety precautions, uses stopgap measures when problems arise, counts on high turnover[25] to prevent toxic results, and misleads oversight agencies concerning its efforts to correct cited problems.[26] For employees, this approach also forces those who, like the workers at TNS, realize over time that their well-being is in jeopardy to wait and,

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Tennessee Department of Radiological Health (TDRH) under an "agreement state" plan.

[24] See H.R. Rep. No. 102, 97th Congress, 1st Sess. (Gore Report), pp. 120-121.

[25] The plurality weighs this factor as a legitimate assurance of protection of employees from kidney failure. I reject this reasoning, as the entire purpose of Sec. 502 is to permit employees to retain their jobs but escape the abnormal danger.

[26] Specifically, TNS failed to report to TDRH that it had instituted a mandatory respirator program; represented to TDRH that the program was strictly temporary, when it planned to allow the ineffectually implemented program to continue for full workdays for at least 8 months; failed to disclose to TDRH that its air monitoring data had recorded excessive concentrations of contaminants in the first calendar quarter of 1981; and assured TDRH that it was correcting the problems the Division was citing when it was not. See sec. G. *TDRH Inspections*, ALJD infra at 1418.

paradoxically, to hope for a catastrophe to protest abnormally dangerous conditions without risking job loss.

In my view, an industry wide hazard comparison is called for in analyzing whether objective evidence supports employees' belief that conditions are abnormally dangerous. The statute's language implicitly requires a comparison of conditions prompting a walkout to "normal" dangers. In defining the term "abnormally dangerous," I look to an early Board definition: in *Fruin-Colnon Construction Co.*,[27] the Board adopted a judge's definition of "abnormal" as "deviating from the normal condition or from the norm or average."[28] I would look at the risks *in the work itself* to determine the "normal" level of danger – as opposed to dangers arising from the employer's idiosyncratic practices. I would find abnormally dangerous conditions where employees are exposed to risks that, under a standard of reasonableness, constitute excessive or "abnormal" risks to their lives when compared to dangers inherent in the work itself, whether these heightened risks arise from a change in conditions or from a disregard for employee safety.[29]

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[27] 139 NLRB 894 (1962), enf. denied 330 F.2d 885 (8th Cir. 1964).

[28] 330 F.2d 885 at 904. As noted above, the court of appeals denied enforcement of the Board's order. I note that in denying enforcement, the court did not criticize the judge's formulation of the standard for abnormally dangerous conditions. The court instead based its disagreement with the Board's conclusion on its view that the evidence of abnormal danger was inadequate. The plurality provides no reason for spurning this definition, from a case it cites with approval.

[29] Nothing in my position supports the plurality's charge that under my analysis an employer's failure to take reasonable,

Thus, in this case, I would take conditions prevailing in the nuclear industry as a whole as indicating "normally dangerous conditions" in an inherently dangerous industry, and, noting how far below standard the conditions at TNS had fallen, I would find this gap a significant factor, among others, in assessing whether employees had an objective basis for a belief that conditions were abnormally dangerous. But my inquiry would not stop there. As the "reasonable belief" standard requires an examination of the facts as the employees knew them, the characteristics of day-to-day operations in the TNS plant are of central importance.[30]

During the relevant period, TNS manufactured and sold, chiefly to the U.S. Air Force, "penatrators," or armor-piercing, "conventional" projectiles. Depleted Uranium (DU), used to make the penetrators, is a very heavy, somewhat radioactive metal that entered the plant in the form of "greensalt" (uranium tetra-fluoride). Greensalt is

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available measures to reach industrial norms shows "ipso facto" that Sec. 502 applies to the walkout. I would not use Sec. 502 to punish employers that may be violating other statutes. Rather, I would consider the employer's efforts to safeguard employees as a factor in determining whether "abnormal dangers" – as opposed to "normal dangers" prevail. In this respect, I freely admit my differences with the plurality, which has devised a standard under which an employer's neglect of safety is its best defense.

[30] I agree with the judge's factual findings and her conclusions, and I have based the following account and analysis of conditions at the TNS plant on the complete and detailed factual record the judge has developed. I present here a brief summary, not to be taken as an exhaustive account of the facts on which I rely.

heated with magnesium to 3000F in huge retorts, or pots, to produce uranium ingots called "derbies." In 1979 the derbies ceased to be TNS end product, and the derbies were molded into "billets" by melting two 1200 lb. derbies in a huge vacuum furnace. Before the work stoppage in 1981, these billets were extruded at another plant and then returned to TNS to be cut and finished into penetrators. Before 1980, TNS also produced compounds containing thorium, a radioactive material. As the judge found, DU presented a health threat to employees not only because of its radioactivity but because, as a heavy metal, it is extremely irritating to human tissues and difficult to excrete. Lung and kidney damage can result from exposure to heavy metals.

Uncontroverted testimony portrays prewalkout safety operations at TNS as haphazard, with much equipment in disrepair and a marked lack of managerial or supervisory focus on safety or health regulations and procedures. Greensalt frequently spilled, and, despite special handling requirements, usually stayed on the floor until the cleanup period at shift's end because no production break was ordered for immediate cleanup. Greensalt also leaked from the broken blender, mended with duct tape; these spills also stayed on the floor and circulated through the shop on air currents, employees' shoes, and the tires of inshop vehicles. Retorts frequently overflowed and leaked greensalt when moved about within the shop. Employees packed greensalt into retorts by hand; the ventilation collar, intended to keep the greensalt dust from rising into their faces, seldom worked. The furnaces for firing greensalt had no protective shields, so that employees had no protection from

dust and smoke from frequent furnace "blowout" and "puffout" accidents; supervisors rarely cleared the building following such incidents, unless the smoke was so thick that production was impossible. TNS management rarely took air quality measurements after blowouts and employees waited until shift's end to clear away dust and debris. The judge inferred that thousands of pounds of uranium metal were released into the shop atmosphere during the 5 months before the work stoppage.[31]

Nearly every operation at TNS involved direct contact with greensalt, and inadequate, or broken equipment increased DU's contact with human tissue. For example, employees testified that TNS required them to work with inadequately cooled DU "derbies" that gave off smoke and sparks when struck to break off rough edges and waste. Employees prepared waste products for burial in a toxic waste site by hand, shoveling the slag into drums. The waste area, despite longtime employee complaints about its filth, contamination, and poor ventilation, was not enclosed until after the work stoppage. The downdraft ventilation table on which employees "slagged" derbies, or removed surface waste and irregularities, had insufficient suction to draw off toxic particles; the vacuum furnace, in which the volatile DU was fired under pressure, periodically blew up, emitting so much smoke and dust that the plant had to be evacuated. Employees cleaned the dense radioactive material from the furnace by hand, as the vacuum hose designed for the purpose lacked the suction to do the job. Employees were required

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[31] The failure of TNS to take measurements after blowouts makes exact factual findings impossible.

to paint the exterior of one assembly by hand with brushes and sponges; they were not required to use respirators while doing so. The judge found that this part of the manufacturing process was especially hazardous, as thorium-234, a radioactive material emitting beta particles, floated to the top of the molten substance. The judge also found that TNS did not monitor for beta-particle exposure at this station.

Machinists who prepared billets for shipment worked by hand with saws and lathes to remove impurities and turn out billets of a standard size. Fires often broke out at the lathe; the operator testified that he did not wear a respirator when quelling the fires and had never been instructed to do so. In addition, grinders dripped water contaminated with oxide dust, vats of radioactive sludge overflowed onto the plant floor, and a fine mist of recirculating coolant contaminated with radioactive dust sprayed into the air.

Employee perceptions that safety conditions at TNS were inadequate were echoed over and over in the judgments of outside observers. As the plurality notes more extensively, TDRH informed TNS of problems in the radiation safety program after each inspection: as early as 1978, TDRH found a "severe laxity" in commitment to employee safety; it noted that the TNS radiation program "did not appear to be administered adequately to provide the maximum degree of protection" and noted that TNS had not properly notified it of exposure of personnel to radiation outside limits and noted that TNS was not adequately surveying radiation hazards. Subsequent TDRH inspections revealed, and TDRH criticized, deficiencies in training and safety procedures, excessive

levels of radiation and contamination, and, less than 2 months before the walkout, the institution of a continuous, full-time respirator program.

In addition to TDRH, TNS's own retained experts, Radiation Management Consultants (RMC), criticized the plant's safety and health levels sharply in a report prepared for TNS management after the work stoppage. The survey found that TNS was deficient in six "areas of noncompliance": limiting concentrations of airborne materials to restricted areas; respiratory protection; surveys of emissions; release of effluents to unrestricted areas; personnel monitoring; and training and calibration. The consulting team commented in part:

> [T]here seems to be a lack of management commitment to a radiation safety program. . . . We observed many areas of noncompliance. These coupled with the past history of whole body and extremity overexposure should be of great concern to management. The plant health physics staff . . . is working to improve the program. However, plant management has to support these changes and has to pay strict attention to the program."[32]

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[32] Report of Radiation Management Consultants (RMC), quoted in Gore Report, supra at 129, 134. The plurality's characterization of the RMC report as "mixed" is charitable. In truth, the report is sharply critical of TNS. Further, its characterization of DU, quoted by the plurality, as a "rather innocuous isotope" precedes the following observation, which my colleagues ignore: "[TNS] must assume, as will the regulatory bodies, that since regulatory requirements are based on health and safety, not meeting such requirements represents a health and safety hazard."

Finally, TNS management itself was aware of the serious problems in the plant. TNS Environmental, Health, and Safety Manager Hoynacki testified that in January 1981, he recommended to management that the plant's penetrator and billet shops be closed down until air quality improved, but that management vetoed that step. Further, as noted above, O'Brien candidly admitted that TNS management had acknowledged privately that the Union's contentions that the plant was dangerous were correct.

This summary merely outlines the evidence concerning the plant's safety that presented itself to employees, and I find that the General Counsel has clearly demonstrated objective evidence for a belief that abnormally dangerous conditions prevailed. Employees believed that they endured excessive and unnecessary exposure to toxic compounds; experts have verified that they did. Employees believed that TNS management lacked a commitment to their safety; regulatory agencies and experts verified that TNS management indeed lacked such a commitment. Employees believed that their training in health and safety procedures was inadequate or nonexistent; regulatory agencies and experts verified that their training was inadequate under Federal standards. Employees believed that TNS was substituting mandatory use of respirators for engineering control of air quality and that longterm respirator use was physically and psychologically impossible; regulatory agencies also believed that the respirator policy was longterm and verified that employees could not realistically be expected to wear the respirators for the periods of time TNS management expected. Employees came to believe that they were

endangered by disease that would only become manifest in the future; experts have verified that the exposure they experienced could lead to future illness and death, as Chairman Stephens and Member Oviatt acknowledge.

In my view, conditions at TNS render the plurality's requirement that employees demonstrate a "significant decline" completely inappropriate. I agree with the findings of the Board's trier of fact, Judge Pacht, that conditions at TNS were so far below those prevailing in the industry and evidence of excessive exposure to toxins with no indication of a management commitment to improving safety conditions was so abundant, that the TNS employees were justified in viewing conditions as abnormally dangerous and in walking off the job when other efforts to correct the problems failed.

This standard and analysis, as well as the result, are fully compatible with the statute's language and with the Supreme Court's discussion of the law in *Gateway Coal v. Mine Workers.*[33] As I demonstrate here and in my discussion of the concurring position, both the plurality and the concurrence have distorted *Gateway's* language and holding. In *Gateway,* a Section 301[34] suit to compel arbitration, the Court held that a mine operator's reinstatement of foremen who had falsified air flow records was arbitrable under the parties' contract and that a district court had authority to enjoin the strike protesting the reinstatement. The Court found that Section 502 did not deprive the district court of authority because the lower court had

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[33] 414 U.S. 368, supra fn. 2.

[34] 29 U.S.C. § 185.

mooted the issue of whether abnormally dangerous conditions prevailed at the mine by expressly requiring, as a condition of the injunction, that the mine operator remove the foremen from the mine. Thus, *Gateway* does not address whether, much less hold that, conditions at the mine were not abnormally dangerous. Contrary to the plurality, *Gateway* did not involve a viable issue of abnormally dangerous conditions, and it does not require that the complaint here be dismissed. What *Gateway* does require is that work stoppages under Section 502 involve an "identifiable, presently existing threat to the employees that an abnormally dangerous condition for work exists."[35] I believe that the General Counsel's case meets these requirements.

Earlier cases neither require nor follow the narrow approach that the plurality claims is mandated by their "mine disaster paridigm." As the judge observed in *Combustion Engineering*, "neither Section 502, nor the legislative history, limits the kind of danger that may be considered abnormal."[36] Although the plurality's interpretation of *Gateway Coal* looks for "immediate" danger to employees,[37] nothing in the statute or binding precedent requires that employees must literally be fleeing for their lives to invoke Section 502. The plurality acknowledges that conditions at TNS were "less than state-of-the art"; that employees were exposed to higher than permitted levels of airborne contaminants; that the Respondent's failure to cure dangers in the workplace was

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[35] 414 U.S. 368 at 385-387.

[36] 224 NLRB 542 550 (1976).

[37] *Gateway Coal*, supra, 414 U.S. 368 at 385-387.

reprehensible; that exposure to radiation had been gradually increasing for the 18 months preceding the work stoppage; that the TNS employees endured greater exposure to toxic substances than did similarly situated employees; and that oversight agencies had regularly cited TNS not only for substandard conditions but also for its refusal to correct them. Yet, because the case involves no dramatic feature comparable to a runaway freight car or a canary dying in a mine shaft, Chairman Stephens and Member Oviatt would not find abnormally dangerous conditions under its first alternative. I believe, as does the judge, that conditions at TNS deviated from the norm or average so significantly that it was unnecessary to wait for conditions to undergo a drastic change – to wait, in effect, for the canary to be dead and buried – before the employees' walkout attained Section 502 protection.

b. *The plurality's second alternative: Have the employees demonstrated that they stopped work at the point where they reasonably believed, based on objective evidence, that further exposure would pose an unacceptable risk of injury?*

Again, I find that the facts found by the judge demonstrate that the employees did stop work at a point where they had a reasonable, objectively based belief, that further exposure to toxins in the TNS plant posed an unacceptable risk of injury. The plurality's opposite conclusion results, in my view, from its efforts to fit a fluid, longterm process of exposure and possible injury into a rigid framework. The effect is to erect an insuperable barrier of proof and thus to deny the statute's protections

to employees who may be endangered by the longterm effects of toxins or carcinogens but are not yet symptomatic.

The plurality's test, as applied to the facts here, would work well in a world in which human beings were fully conscious of their own processes of cell division and tissue development. In such a world, employees might be able to say with conviction, "Yes, this is the moment; if this level of exposure continues I shall certainly suffer renal failure in six years," and act accordingly. In our world, however, the human body's ability to resist injury differs in individuals and changes over time. To expect a group of workers to know when "such a danger threshold has been reached" appears, as a practical matter, to be entirely unrealistic, and to dismiss a complaint because the burden of proof has been defined in terms of scientific questions that at present cannot be answered will certainly assure that such allegations shall always be dismissed. Further, once a particular worker has reached a point where further exposure will cause measurable physical changes, it may already be too late to protect his health. Thus, under the plurality's test, employee action will be premature until a time when it may well be too late.

Under the plurality's application of this alternative, as with the first, timing is everything. The plurality requires employees to walk out just when their overexposure – for no one contends at this point that the TNS employees were not overexposed – reaches that magic threshold, where overexposure that was reasonably risky turns into overexposure that is unreasonably risky. This requirement is totally at odds with the statute's purpose.

Section 502's wording shows that it is meant to enable employees to leave workplaces before injury occurs, not to quit it as an acknowledgement of injury. Board case law recognizes that Section 502 is preventive in nature.[38]

In addition, as the plurality admits, experts disagree on radiation's effects, tolerable exposure levels, when injury begins, and nearly every other aspect of occupational safety and health in this area. The plurality reacts to this plethora of fact and theory by placing an additional burden on the General Counsel, noting disapprovingly that "the record does not even establish what that threshold level of exposure [beyond which further exposure constitutes an unacceptable risk] is. . . . " The plurality fatally oversimplifies the evidence by supposing that one single level of exposure will apply to all employees.[39] The evidence indicates that the threshold

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[38] See *NLRB v. Knight Morley Corp.*, supra, fn. 12, 116 NLRB 140 (1957), enfd. 251 F.2d 753 (6th Cir.), cert. denied, 357 U.S. 927 (1958) (cited with approval in *Gateway Coal*), in which employees faced the possibility of heat related sickness from elevated temperatures and humidity and blowing (nonradioactive) grit. The court found that, as the employees had left soon after the hazard commenced, the fact that none of them actually collapsed was immaterial to evaluating whether the threat actually had existed. The court implicitly recognized that the whole point of Sec. 502 is to get out before injury occurs and accorded Sec. 502 protection to employees who walked out because they *foresaw* the possibility of injury.

[39] Experts disagree even on what approaches should be taken to determine tolerable levels of low-dose exposure to radioactive substances and heavy metals, and on whether low doses are more carcinogenic the brief high exposure. See *Dead Reckoning: A Critical Review of the Department of Energy's Epidemiologic Research*, Physicians for Social Responsibility, The

differs from person to person, and, as the length of exposure would depend on when the employee had been hired, no single figure or date would necessarily cover all employees in the plant. Thus, the General Counsel's burden to provide a magic number applicable to all employees is impossibly heavy. The appropriate burden for the General Counsel here is to demonstrate, by the preponderance of the evidence, that employees had a reasonable, good-faith belief, based on objective evidence, that abnormally dangerous conditions prevailed at their workplace.

The plurality also finds Section 502 inapplicable to the work stoppage here because the Nuclear Regulatory Commission (NRC) and its agreement state agency, Tennessee Division of Radiological Health (TDRH)[40] never

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Physicians Task Force on the Health Risks of Nuclear Weapons Production (Washington, 1992) pp. 30-31.

I firmly believe that the Board must continue to analyze issues such as whether the employees reasonably believed, on the basis of objective evidence, that abnormally dangerous conditions existed at TNS in labor law terms. For that reason, I am unwilling to rely on the decision of sister agencies and I, like the administrative law judge, am intent on examining what the employees themselves had to work with in evaluating whether the TNS work stoppage meets the above criteria.

[40] The plurality's statement that Kerr of NRC "commended" TDRH's regulation of TNS is hardly an accurate representation of Kerr's remarks. In fact, he stated that the overall Tennessee program was adequate to protect *public* health and safety, but that "[w]e do not maintain a 100 percent oversight of agreement state licensing and compliance actions. However, we have increased our level of attention to their actions relative to TNS." Gore report at 245. Kerr went on to say that TDRH was carrying out its duties regarding TNS in an appropriate manner. Id.

found that the facility was "so unsafe as to require the removal of employees from the plant on May 1, 1981." Although the plurality asserts that the inaction of the agencies is but one factor in deciding whether Section 502 covers a work stoppage, it appears that, absent extreme dereliction, an oversight agency's inaction raises a virtually irrebuttable presumption that the facility is not abnormally dangerous. In effect, then, the plurality shifts the focus of a Section 502 inquiry from whether the *employees* had a good faith belief, based on objective evidence, that conditions were abnormally dangerous, to whether the *oversight agency* had such a belief. In doing so, the plurality contradicts previous Board case law and, even more important, nullifies the effect of the statute.

In *Roadway Express*,[41] the Board found that Section 502 protected a driver who refused, on the basis of the vehicle's "feel" on the road, to operate a truck, even though a department of transportation safety inspector inspected it and found it safe to drive. The Board found that the driver's belief that the truck was unsafe was supported by objective evidence, citing his observation of the truck's shimmying and twisting on the road.

> Such evidence, we believe, is objective enough to lead a person to reasonably determine that he should not drive such a truck. We do not believe that [opinions] . . . that the truck was safe diminish the reasonableness of [the driver's] belief under the circumstances. Nor do we deem relevant in considering the reasonableness of [the driver's] activity the fact that the truck was

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[41] 271 NLRB 278 (1975).

> subsequently driven safely for several hundred miles without repairs having been made.[42]

Under the plurality's analysis, this driver, who based his conclusion that the tractor was unsafe on his own experience and judgment, should not have received the statute's protection because the safety inspector did not pull the truck off the road. To the plurality, this case would have presented a mixed question of labor law and vehicle transmission issues, in the same way that in this case "the epidemiological issues are inextricably intertwined with the labor law question." Yet the Board in *Roadway* was able to focus on the employee and the reasonableness of his beliefs without examining whether the inspector's beliefs with respect to the truck were reasonable. In binding precedent, the Board viewed the employee's concerns about the truck's performance as sufficiently objective to accord his refusal to drive it Section 502 protection. I see no way to reconcile the plurality's approach with that of this binding precedent.[43]

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[42] Id. at 280.

[43] In attempting to distinguish this case, the plurality appears to assert that in *Roadway* the truckdriver knew all about trucks and at TNS the employees knew nothing about toxins, so the plurality is justified in substituting outside agencies' judgment for that of the TNS employees. The contrast between the cases really shows something quite different, however. In *Roadway*, there was, in fact, nothing wrong with the truck, although the employee's instincts and experience, valued by the Board, told him that there was. In this case, the employees were, in fact, being overexposed to toxins, as their judgment, experience and efforts to educate themselves told them that they were. The key difference is that in this case, where the employees were shown

In addition, the plurality's unquestioning assumption that if TDRH or NRC had concluded that the situation at TNS had reached "abnormally dangerous conditions"[44] it would have closed down the facility, or at least tried to do so, without delay, is unrealistic and arbitrary. To accord with the overall policies of the Act, the plurality's reasoning must rest on the assumption that employee safety is the chief priority of these agencies, as employee rights are the chief priority of the Act. This is not the case, however. The statement of purpose of NRC's enabling legislation, the Atomic Energy Act, demonstrates beyond doubt that employee safety is far from the agencies' paramount concern. Congress declares in relevant part that the nation's policy is that

> the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject to . . . the maximum contribution to the common defense and security . . . [and] shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.[45]

This statement of purpose contains no mention of employee safety or rights.[46] The plurality, noting that

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to be correct, the Board plurality ignores their experience and judgment.

[44] These are dangers that are "deviating from the normal condition or from the norm or average," *Fruin-Colnon Construction Co.*, supra 139 NLRB at 904 fn. 19.

[45] 42 U.S.C. §§ 2011(a)-(b).

[46] Neither does the Tennessee code provision (Radiologic Health Service Act, currently cited Tenn. Stats. 68-202-201 ff.)

NRC and TDRH have implemented standards for the protection of public health and safety, argues that under the applicable statutes and regulations, employees are members of the public, so that this concern for public safety involves, necessarily, concern for employee safety. While the statutes and regulations covering the nuclear industry do not ignore employee safety, it is plain that employee safety is not their chief priority; indeed, far from being synonymous with public safety, employee safety is subjected to different and vastly more lenient standards than public safety. In fact, the regulatory agencies apply very different standards to measure safe levels of radiation in employees as distinct from the public. As Wayne Kerr, then NRC director of office of state programs, testified to the Gore Committee, the level of radiation exposure considered safe for employees is 10 times as high as that set for an individual citizen, and over 20 times as high as that set for the public as a group. Kerr stated that

> [O]ccupational guidelines, regulations, or whatever they are called, are more liberal than those that are allowed for the population at large. You focus on a different segment of the population, a working segment; you don't have children involved; in the general population, you have to

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governing atomic energy and nuclear materials. As the plurality points out, the purpose of that statute is, in relevant part, to apply "controls and regulations with respect to radiological health and safety to protect the health and well-being of the people of Tennessee." No mention is made of the health and well-being of employees who handle such substances.

> consider things like the younger population that are in it. . . .[47]

The plurality avers that I have pointed to nothing to suggest that NRC or TDRH would fail to seek closure of an abnormally dangerous nuclear facility because of countervailing considerations. I believe that I have shown why it is not reasonable to assume that these agencies would act promptly to close TNS down under those circumstances. However, my colleagues miss the point.[48] The plurality is setting out a presumption by which the General Counsel's factual showing in this case, and in future cases, will be judged: that an agency charged, among other things, with protecting worker health and safety, would necessarily seek plant closure if it found that abnormal dangers existed. In doing so, the plurality should show that the presumption is reasonable: that the two factors – existence of abnormally dangerous conditions and action to close the plant's operations down – are, in reality, likely to be causally linked.[49] In my view, they have failed to show such a linkage in this case. The plurality points to nothing beyond its unsupported

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[47] Gore Report, supra at pp. 246-247.

[48] The General Counsel would, as in all cases, bear the burden of demonstrating that the employees' belief in the existence of abnormally dangerous conditions was reasonable.

[49] I note that the oversight agencies are presumed to apply a "danger in fact" test to the question of whether all or part of an employer's operations should be closed down. This standard is different from, and more stringent than, the Board's test for Sec. 502 protection: that the employees reasonably believed, based on objective evidence, that abnormal dangers exist in their workplace. Thus, I would not accord the plurality's presumption the virtually dispositive weight that they ascribe to it.

assumption, which is, in this case, rebutted by the testimony of both state and Federal officials and the language of the the governing statutes themselves. I remain unconvinced that NRC and TDRH regulation obviates the need for Section 502. Apparently Congress felt as I do, as it has allowed Section 502 to remain the law even though state and Federal agencies have set guidelines for inplant exposure to toxic substances.[50]

In addition, TNS' relations with TDRH hardly constitute laboratory conditions for testing the validity of the plurality's assumption that if TNS were abnormally dangerous to employees, TDRH would have closed it down promptly.[51] The record documents TDRH's difficulties in

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[50] The plurality also avers that they do not invoke the actions of NRC and TDRH as binding rules of law, but as factors the employees should have given "significant" weight to, but they "apparently" did not. It is plain that to the plurality, "significant weight" is nothing more than a formula for an irrebuttable presumption that, in the absence of extreme dereliction, a plant permitted to continue operating by regulatory agencies is not abnormally dangerous. I would not impose such a presumption.

[51] The plurality's confusion with respect to the statutory goals of NRC and TDRH goes even further, however. The plurality insists that an individual cannot form a reasonable belief about conditions in a nuclear plant without giving due consideration to the actions of the regulatory agencies. Such a standard is necessary, in the plurality's view, to prevent an "end run" – presumably by employees – around the statutes applicable to worker safety. The plurality has missed the point of the Atomic Energy Act: it was passed to regulate the nuclear *industry*, not the employees. Perhaps this misconception has contributed to the plurality's confusion with respect to whose reasonable beliefs are at issue here – the employees' or the agencies'.

eliciting responses from TNS management. TDRH's officials frankly discussed its limited enforcement powers. Such evidence increases my unwillingness to depend unquestioningly on the regulatory agencies' failure to stop TNS from operating and demonstrates yet again the fundamental arbitrariness of the plurality's reasoning.

Moreover, safety legislation and oversight agencies do not relieve the Board of its statutory task of determining, from the point of view of the employees, whether they had a reasonable belief, based on objective evidence, that abnormally dangerous conditions prevailed at their workplace. The plurality notes that the Board has no place among experts on radiation, the risks associated with various exposure levels, and other technical, or scientific aspects of determining what constitutes abnormal danger to employees. While I grant that we are not experts in radiation health and safety, I note that Congress itself has told us that we have such a place, in the very act of passing Section 502, and the plurality itself concedes that the task of defining "abnormally dangerous conditions" lies with the Board and the reviewing courts. Thus, the issue here is, irreducibly, a labor law question and not an epidemiological one.

Further, the plurality's dependence on TDRH's inaction for its finding that no objective basis existed for belief in abnormally dangerous conditions at TNS ignores the broad sweep of Section 502 and its emphasis on the *employees'* perceptions and judgment. Section 502 is superfluous when everyone agrees that a workplace is abnormally dangerous. Indeed, in every case in which the Board has found abnormally dangerous conditions, some party has contended that conditions were safe. Section

502's wording clearly indicates that Congress intended it as a self-help safety valve for employees who disagree when others who have a say in the matter, such as their employer, tell them their workplace is safe. Prior Board cases reflect this approach, although they have always demanded an appropriate showing of an objective basis for the belief. Employees have not lost the statute's protection even where they may have been mistaken as a matter of fact about the abnormal danger.[52] Thus, the plurality's assertion that I have marshalled not a single fact to support the TNS employees' fear that they were being overexposed to toxins could be directed as easily at some earlier Board findings that Section 502 protected employee actions.

In addition, the plurality seems to impose a requirement that employees exhaust administrative remedies under other statutes, by emphasizing the employees' failure to seek closure from TDRH before the walkout. Nothing in the statute provides a basis for inferring such an exhaustion requirement.[53]

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[52] See *Roadway Express*, supra, fn. 41.

[53] Further, the plurality's disapproval of the employees' failure to call on TDRH directly until after the strike began conflicts with their emphasis on prompt withdrawal from the workplace. Under the Occupational Safety and Health Act, 29 U.S.C. §§ 651, 660(c)(1), employees are encouraged to use other means of correcting dangerous circumstances and have the right to leave the workplace if they believe that time is too short to pursue action though OSHA and the courts. See *Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1979). In this case, however, the plurality actually penalizes the employees for delivering an ultimatum to the employer and allowing it time to respond, and further, for attempting to resolve their concerns about overexposure through collective bargaining.

I note that TNS was never found in full compliance with regulations and was viewed by the agencies as among the very worst in the industry, Moreover, the inherent limitations of oversight are well known and documented. William Graham, director of TDRH at the time of the walkout, candidly acknowledged to the Gore Committee that TDRH lacked sufficient resources to force nuclear operators to comply with applicable standards: Graham noted that TDRH's

> enforcement procedures consist of persuasion, and are ultimately followed by appropriate legal action if [TDRH's] directives are refused or ignored. In most cases . . . [TNS] agreed to correct the violations. At times, though, extensive negotiations were necessary to achieve compliance. This Division does not presently have the authority to levy civil penalties . . . [T]his case has demonstrated to us the need for this authority as an added tool in achieving compliance with our regulations."[54]

Thus, while I agree with the plurality that the judgments of regulatory agencies should be considered in judging whether Section 502 applies, I accord far less weight than the plurality to the bare fact that TDRH did not pursue court action to shut the plant down. Consequently, I do not believe that the employees' failure to be convinced by that bare fact renders unreasonable their belief that abnormally dangerous conditions prevailed at TNS.

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[54] Gore Report at 231.

4. Member Raudabaugh's view

Member Raudabaugh takes the position that even if the General Counsel has demonstrated that the TNS employees reasonably believed, based on objective evidence, that working conditions were abnormally dangerous, their work stoppage would *still* be unprotected because the General Counsel has not shown that they walked out *solely* to protect themselves from the abnormal danger, as he contends *Gateway Coal* requires.[55] For Member Raudabaugh, then, the TNS work stoppage is not covered by Section 502 because the employees put it off until their collective-bargaining agreement expired on April 30, 1981, and some issues in negotiations were unresolved when the walkout occurred. My concurring colleague dismisses credited or undisputed evidence that workplace danger was the overriding cause of the work stoppage and finds that the parties' failure to settle all issues means that the work stoppage was fatally tainted by economic interests. As with the plurality, Member Raudabaugh's basis for analysis contradicts prior precedent and introduces a new and arbitrary standard. As Member Raudabuagh concedes, no binding Supreme

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[55] Thus, even if the TNS employees successfully navigate the intricacies devised by Chairman Stephens and Member Oviatt, Member Raudabaugh would still foreclose them from Sec. 502's protection because they are unable to prove the truth of a negative statement. Under this rationale, employees will, in effect, be required to demonstrate the *absence* of any other reason for their walkout. Thus, Member Raudabaugh requires that employees demonstrate, not that their concern about abnormally dangerous working conditions caused their walkout, but that no other reason caused it.

Court rule justifies the holding that the existence of open bargaining issues when a walkout occurs removes that walkout from Section 502's protection.[56] Further, I believe that Member Raudabaugh's conclusion contradicts prior Board case law, is inconsistent with jurisprudential canons, is rebutted by probative evidence, and suffers from the same shortcomings as the plurality opinion by failing to come to grips with the novel fact pattern presented in a case involving longterm exposure to slow-acting toxins.

a. *Board precedent*

In *Combustion Engineering*,[57] the Board upheld the finding that an employer violated Section 8(a)(1) by discharging employees who left the job because they were afraid that two drunk and belligerent coworkers would return to the site and make trouble. The judge found that the employees' departure was motivated in part by fear of a beating but that other reasons influenced their decision to stop work: the employees were also "concerned and embarrassed" that the aggressors' behavior would reflect badly on them and they wished to avoid, "and preferred to assure avoiding, fighting with [the aggressors] not only because of the danger but also because fighting on the job, whether engaged in rightly or

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[56] Member Raudabaugh denies that, under his analysis, this fact alone removes the TNS work stoppage from Sec. 502's ambit. But as I show below, he musters no other factual support whatever for the conclusion that the employees' reasons for stopping work were fatally tainted with economic motives.

[57] 224 NLRB 542 (1976).

wrongly, in their experience meant discharge for all participants."[58] In that case, the Board did not demand absolutely pure motivation to find that the employees' walkout was protected. Thus, Member Raudabaugh's "sole cause" position is inconsistent with settled Board precedent.

Member Raudabaugh would distinguish *Combustion Engineering* from TNS because in *Combustion*, in his view, the danger was such that if the employer acted to remove the drunken employees, the walkout would have ended. TNS, he implies, is different – and therefore Section 502 would not apply – because the Union did not make "proposals designed to bring about an immediate correction of these conditions" so that the walkout could also have ended quickly and decisively. I believe that his reasoning errs in two respects.

First, Member Raudabaugh ignores the fact that the Union *did* demand that TNS make changes to remove the immediate danger.[59] Second, he completely ignores the obvious fact that the danger presented in *Combustion* is not in any respect comparable to that in TNS. Thus, the employer's appropriate response in *Combustion* – to rid the worksite of two drunks – is not in any respect comparable to TNS' appropriate response – to reduce the excessive exposure to toxins in dozens of processes at dozens of locations within the plant arising from TNS's failure to correct hundreds of instances of malfunctioning or broken equipment, to follow cleanup and decontamination

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[58] Id. at 546.

[59] See ALJD infra at 1420-1421.

procedures, to provide proper equipment, and to provide employees mandated health and safety training.[60] The TNS employees' efforts to end the abnormal danger accordingly involved many proposals for change, some amenable to immediate action, some, realistically, requiring time to correct.

Member Raudabaugh's comparison of *Combustion Engineering* to TNS, then, amounts to telling the TNS employees that demanding that TNS "fix the plant! All of it! Now!" would be more likely to win Section 502 protection for them than their careful and explicit reference to previous safety checks and lists of problems, their acknowledgment, based on what they knew of the hazards, that some corrections would take time, and their willingness to give their employer a chance to make the needed changes, or at least get started on them, before embarking on a costly and painful work stoppage.

In addition, Member Raudabaugh has created a standard impossible to apply in a situation like that at TNS. That abnormally dangerous conditions are the "sole" cause of a walkout may easily be demonstrated in an emergency situation. By contrast, where no emergency exists, it may well be virtually impossible to prove sole

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[60] Member Raudabaugh misinterprets my analysis. My point that the dangers at TNS are, because of their complexity, qualitatively different than those in *Combustion* means that the measures to remove the dangers at TNS would be qualitatively different than those in *Combustion*. Thus, I find my concurring colleague's differentiation among proposals directed at immediate dangers and proposals directed at longer term dangers misses the mark. In *Combustion*, a quick fix was available to the employer. In TNS, no quick fix was available.

causality, as employers and employees frequently have unresolved differences, even outside the context of collective bargaining. If Member Raudabaugh intends to limit Section 502 coverage to emergencies, where employees are running for their lives, he need only say so and it will instantly be clear that Section 502 will not protect the TNS work stoppage, nor any work stoppage involving longterm exposure to toxins. Member Raudabaugh's discussion of the plurality position, however, indicates that, in his view, Section 502 does apply in cases of exposure to slowacting toxins and that he is sensitive to the problems of proof and persuasion in this highly complex area. Thus, he appears to argue for a realistic approach to the existence of abnormal danger, but then to erect an insuperable barrier to Section 502 protection by crafting a causality test that employees facing abnormal dangers during negotiations or in nonemergency situations can never satisfy.

Further, his disclaimer that de minimis distractions will not obviate a "sole cause" finding will not, as a practical matter, give employees like those at TNS a crack at Section 502 protection. The "de minimis" exception, by definition, applies only to trivialities; employees and employers in situations where exposure to toxins is at issue may have other, *serious* differences over which neither side would take decisive economic action. In my view, the *"but for"* test, applied to this and similar situations, yields a fairer analysis and result. If the employees would not have stopped work *"but for"* the abnormally dangerous conditions, then those conditions were the cause of the work stoppage. In this case, the General Counsel has amply demonstrated here that but for the

abnormally dangerous conditions, the employees would not have stopped work.

b. *Member Raudabaugh's reading of Gateway Coal*

As support for his premise that no other motive, thought, or expectation can play any role in a Section 502 work stoppage, which he terms the "sole cause" test, Member Raudabaugh cites Gateway Coal's comment that "a work stoppage called *solely* to protect employees from immediate danger is authorized by Section 502."[61] My concurring colleague concedes that a reading of *Gateway Coal*'s quoted language in context demonstrates that it was not intended to announce a rule of law, and certainly not a rule governing all claims of Section 502 protection, regardless of their facts, Notwithstanding his recognition that the language he cites from Gateway is dictum, he still argues that *Gateway* establishes a causality test covering work stoppages over dangerous conditions in all circumstances. In doing so, Member Raudabaugh rejects fundamental principles of judicial interpretation.

In the relevant passage, the Court discussed the appeals court's finding that " 'a refusal to work because of a good faith apprehension of physical danger is protected activity and not enjoinable, even where the employees have subscribed to a comprehensive no-strike clause in their labor contract.' "[62] The Court stated in full that "[w]e agree with the main thrust of this statement –

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[61] 414 U.S. 368, 385 (emphasis added).

[62] Id. at 385 (citation omitted).

that a work stoppage called solely to protect employees from immediate danger is authorized by Section 502 and cannot be the basis for either a damages award or a *Boys Markets* injunction,"[63] and held that as the basis for the claim of abnormal danger had been eliminated, Section 502 did not bar the district court's injunction of the strike and that the dispute at issue was arbitrable under the parties' contract.

If the case involved an alleged violation of a no-strike agreement and a petition for damages or an injunction, the Court's words might carry the precedential force Member Raudabaugh ascribes to them. But that is not the case. The facts here are distinguishable from those in *Gateway Coal* on the very point on which he relies in fashioning the "sole cause" test, and, to make matters worse, the "sole cause" language is not an expression of, or even necessary to, the case's holding, as Member Raudabaugh concedes. Thus, the language on which Member Raudabaugh relies in dismissing the TNS employees' claim is not a rule of law or a case holding – it is dictum.

I believe my colleague errs by elevating dictum to "test." In my view, it matters what question the Supreme Court decided in *Gateway Coal* and how the quoted language is related to the Court's holding. I find no basis to infer that the Court intended its comment to announce a "test" for Section 502 coverage under a no-strike clause, still less a "test" for work stoppages under factual circumstances not discussed, and not even contemplated, by the Court.

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[63] Id. at 387.

The more cautious approach to precedent that I advocate is justified by fundamental principles of jurisprudence. Chief Justice Marshall's seminal discussion of judicial interpretation in *Cohens v. Virginia*[64] is instructive:

> [G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit. . . . The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

This statement of the proper uses of legal precedent applies all the more strongly in this case, where the "general expression" in *Gateway Coal* does not even correspond to the facts we scrutinize here. Thus, Member Raudabaugh's position that the allegedly "mixed motive" of the walkout removes it from the ambit of Section 502 is based largely, as he himself concedes, not on binding Supreme Court precedent but on policy considerations. I find the clear language of Section 502 overrides Member Raudabaugh's policy concerns. He would deny Section 502 protection to employees who have demonstrated that they stopped work because their lives and health were at abnormal risk because of no-strike clauses and notice provisions. I reject this approach. Once employees have

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[64] Wheat 264, 399 (quoted in *Humphrey's Executor v. U.S.*, 295 US. 602, 607 (1934)).

shown that they are working in abnormal danger, as Member Raudabaugh has conceded here for argument's sake, their safety, and their jobs, should take precedence over such concerns, even if other matters are undecided between the parties. This analysis is consistent with the statute, and also represents the appropriate policy choice.

In his response to my dissent, Member Raudabaugh asserts that I "ignore" the Court's language. I do not. I merely point out the obvious: that in agreeing with a statement about Section 502's function in an explicitly described fact situation and then finding that the Section 502 issue is not before it, the Court is not setting a standard applicable to all fact situations in which the statute is invoked. Stated simply, *Gateway Coal* is silent as to this aspect of the case.

c. *Member Raudabaugh's factual analysis*

The judge's factual findings (undisputed by Member Raudabaugh) belie my colleague's conclusion that the employees' concern for abnormally dangerous conditions was not the cause of the strike. Member Raudabaugh marshals one single fact to support its conclusion that the work stoppage was caused, "at least in part," by a desire to achieve a satisfactory contract: the employees waited to walk off the job until their agreement expired. Further, Member Raudabaugh dismisses the judge's conclusion that the employees ceased work because they believed that working conditions at TNS were endangering their health, as supported only be "subjective" evidence;[65] he

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[65] This spurious distinction between "objective" evidence and the "subjective" evidence of employee testimony as to the

prefers "objective" evidence as grounds for the conclusion that the union called the work stoppage, at least in part, to accomplish its bargaining objectives and to protest the abnormally dangerous conditions. The "objective" evidence Member Raudabaugh musters as support: one fact – bargaining issues remained on the table when the walkout occurred.

To described Member Raudabaugh's factual showing as thin is an understatement. But when it is compared to the overwhelming evidence that the employees would not have walked off but for the abnormally dangerous conditions on which the judge relies, it brings to mind the fadeout of the Cheshire Cat in "Alice in Wonderland,"

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reasons they walked off the job runs completely counter to the Board's analysis of the causes of the work stoppage in *Knight Morley Corp.*, supra at 145, in which employees walked off the job because a malfunctioning exhaust fan blew dust into and failed to cool the buffing shop. The employer argued that the invocation of § 502 was a pretext; the real reason was to "enforce the demand made . . . before the shift . . . that the afternoon buffers be permitted to go home after working 2 hours in order to equalize their hours with those of the morning shift." In rejecting that contention, the Board relied on the fact that "*the buffer witnesses testified that the reason* [emphasis added] was the heat and the dust, a reason which arose *later*" (emphasis in original).

My concerning colleague points out that *Knight Morley* predates *Gateway Coal* and thus has no relevance here. On the contrary, if the Court, in deciding a Sec. 301 suit, felt that *Knight Morley* alleging violations of Sec. 8(a)(3), were incompatible it would have said so. Member Raudabaugh's dismissal of *Knight Morley* as precedent points up *Gateway Coal*'s poor fit with this case: the facts are different, the statute is different.

where all that's left is the smile. Further, Member Raudabaugh's inability to point to any fact other than that bargaining had not been completed is the best evidence possible that his "sole cause" test would preclude any group of employees under any circumstances from showing, if negotiations were ongoing, that they walked off the job because of abnormally dangerous conditions.

Even his effort to show that the "sole cause" test will work when no no-strike clause applies is undercut by record evidence. In this regard, Member Raudabaugh states that

> If the union simply informs the employer that the work stoppage will terminate upon the correction of the abnormally dangerous conditions, even if the economic dispute is unresolved, that would appear to establish, at least prima facie, that the sole cause of the work stoppage is the abnormally dangerous conditions.[66]

On March 10, John Bettis, Local Union president and delegate to the Atomic Energy Workers Council, sent TNS management this message:

> the employees will not return to work after April 30 until the items which are on the health and safety report have been corrected and TNS is safe and healthy for the employees to work. This includes items from past inspections as well as items which will be listed during the April inspection.

Bettis' message clearly informed TNS of the reason why the employees were going to walk out on April 30.

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[66] Member Raudabaugh, concurring, supra at 1365 fn. 4.

This communication would appear to constitute "objective" evidence, as it states straight out what TNS must do to end the work stoppage. But Member Raudabaugh rejects Bettis' communication. Because Bettis gave it to TNS 6 weeks before the strike, and as "much can happen in a period of 6 weeks," Bettis' letter cannot be the "simple and clear statement of what it would take to end the strike," as it would have been to Member Raudabaugh if Bettis had sent it just as the employees walked out. I find Bettis' letter to be precisely such a simple and clear statement. I do not agree with my concurring colleague that Bettis' attempt to give TNS a chance to remove the dangerous conditions vitiates the letter's force as proof of the cause of the work stoppage, and I see Member Raudabaugh's reliance on nothing more than the passage of time as yet more proof that his "test" could never be passed by employees facing dangers from slow-acting toxins who are compelled to engage in a work stoppage during negotiations.

Member Raudabaugh avers that when the walkout occurred the parties were far apart on the length of the probationary period; the right to lay off employees for 10 days; the right to terminate employees on medical leave after 6 months; management rights; checkoff; shift assignments; and vacations. In fact, however, the differences as to probation, layoff, termination when on medical leave, and the management-rights clause were integral to the dispute over what to do about the facility's hazards. Member Raudabaugh's view that these safety issues are the wrong kind for a Section 502 work stoppage ignores their relation to the underlying threat of toxic overexposure as well as the whole purpose of § 502. If an

employer responds, in part, to employee concerns about overexposure to toxins by proposing to lay employees off at will, without pay, for up to 10 days, and explicitly refuses to guarantee that it will not use the layoff power against employees showing signs of toxicity,[67] I would find that the employees' concerns had not been addressed. After all, the whole purpose of Section 502 is to protect employees from job loss, if they face the necessity of leaving the workplace because of its dangers. Yet Member Raudabaugh brushes off the employees' unwillingness to accept layoff as a solution to overexposure as a mere economic concern. In doing so, he imposes the same "run for your life" straitjacket on the complex dangers involved in this case as the plurality analysis does.

The judge's findings refute, again and again, Member Raudabaugh's conclusion that nonsafety economic issues were a legally cognizable cause of the strike. On April 29, TNS's spokesman in negotiations, Kriska, presented TNS's final offer and stated that the parties were far apart on many issues and would not be able to resolve the differences. The Union's spokesman, Williams, replied, "Our biggest problem is health and safety," and accused TNS of overexposing employees to toxic substances. Williams further accused TNS of, in the judge's words, "trying to buy a contract with an attractive economic proposal but that they were 'still $2.00 low.' " The judge goes on to find explicitly that "[a]t this point, although the Union had not formally accepted the economic offer both Abel [another Union representative] and Williams

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[67] See ALJD infra at 1421.

recalled that they indicated to the Respondent that the wage proposal was not a problem." Thus, Member Raudabaugh's representation that the union felt that TNS was "still $2.00 low" regarding wages is misleading; in fact, as both Union negotiators indicated agreement with the final wage proposal, the statement was ironic in import.[68] Further, as the judge found, health and safety concerns far outweighed any other reasons at the union meetings where the employees debated, and ultimately voted for, the work stoppage. The judge cited and credited testimony of numerous employees as to their reasons for striking and concluded that the overwhelming weight of the testimony establishes that

> the employees rejected the Respondent's final proposal and voted to strike because they believed that the working conditions at TNS were endangering their health. . . . [T]he record shows that the Union expressed no real concern about Respondent's economic proposal in apparent recognition that it was not troublesome.[69]

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[68] See ALJD sec. VI,E, 1981 Prestrike Negotiations, infra at 1425. Member Raudabaugh relies on this exchange and these findings by the judge as a factual basis for his assertion that the TNS work stoppage was caused by the Union's efforts to get a better wage agreement. I am baffled by his reading of the judge's findings. In view of the fact that the judge is finding, on the basis of *credited testimony*, that wages were not a decisive factor in work stoppage because substantial agreement had been reached on wages, I wonder what *would* convince my concurring colleague that the employees walked out over abnormally dangerous conditions. I suspect that no showing could succeed.

[69] Id. at 1428.

The judge's findings with respect to poststrike bargaining also bear out her conclusion that workplace safety was the cause of the strike. TNS and the Union continued to bargain after the employees walked off the job; Steven Wodka of the International Union's health and safety department presented a union safety proposal, rejected by TNS; TNS commissioned the RMC report, but withheld its existence from the Union and assured the Union that the plant had been inspected and was safe. In fact, when negotiations finally appeared deadlocked after the July 16 session, the only issues remaining were the Union's health and safety language and the 10-day layoff, both safety concerns. These facts, found by the judge and not disputed by Member Raudabaugh, defeat his conclusion that the employees' reasons for stopping work were contaminated by economic concerns to the point that, even conceding that the employees were walking out over abnormally dangerous conditions, their action could no longer be protected by Section 502.

In my view, the evidence found by the judge amply demonstrates not only that the employees' belief in overexposure to dangerous substances caused the strike but that the employees acted from a belief that was not only reasonable, but in good faith. Member Raudabaugh's charge that the evidence is "subjective" completely misses the mark. In fact, the evidence satisfies two requirements for Section 502 protection simultaneously: it demonstrates that the employees' belief that they were being overexposed to toxins caused the strike and it demonstrates that their belief was held in good faith.

Thus, I agree with the judge that the TNS employees undertook the May 1 walkout because of a good faith,

reasonable belief that the TNS facility was abnormally dangerous. Unlike Member Raudabaugh, I find this conclusion thoroughly compatible with the observation, also made by the judge, that some employees may have entertained simultaneous yearnings for a multiplicity of things both tangible and intangible. Peaceful relations with management or a signed, sealed, and delivered collective-bargaining agreement containing favorable provisions may have been among these desires. But desires are not the same as causes, and such simultaneity does not convince me that a cause cognizable at law of the walkout was nonsafety economic issues. There is nothing in the facts, as found by the judge, to indicate that the parties would have struck over the nonsafety related issues still open on April 30: checkoff, shift assignments, and vacation scheduling.[70]

5. Conclusion

In dismissing the complaint against TNS, the Board has doubly failed. It has failed not only employees who

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[70] Further, the existence of abnormally dangerous working conditions does not bring all of industry's other concerns to a halt; thus, I would not find the fact that collective bargaining continued after the work stoppage and involved, to a limited extent, economic matters, sufficient to convert the work stoppage to an economic strike.

Member Raudabaugh mischaracterizes my dissent in stating that I assert that the only basis I cite for my agreement with the judge that the strike was caused by the employees' concern for abnormally dangerous conditions is "subjective" employee testimony. My references to the record also point to numerous factors in addition to employee testimony. Therefore, I believe his critique of my approach on this score is misplaced.

work in hazardous industries, but is has also failed employers of good faith. It is plainly unconscionable to require employees working under the conditions the judge found at TNS to risk job loss to save their own lives and health. It is ironic, too, that by walking off the job at midnight on April 30, 1981, the employees motivated TNS to make numerous changes in equipment and operations to increase safety – for the new employees hired as permanent replacements. Less obviously, it is also unconscionable to require that law-abiding employers compete at a disadvantage with employers that deliberately or negligently refuse to protect employee health. Yet both the plurality and concurring opinions do so and, what is more, they strain to do so by ignoring evidence that weighs against their respective conclusions and relying on dicta from earlier cases.

As I have discussed above, precedent does not compel that the 8(a)(3) allegations here be dismissed. In my view, the results reached by both the plurality and the concurrence are determined, not by case law, statutory language, or legislative history, but by unstated policy considerations that foreclose employee access to the statute. I believe that this case presents the Board with an opportunity to define the law relating to slowacting toxins under Section 502, and that its definition should be guided by the policy that so clearly underlies Section 502: to accord employees protection from adverse consequences when they are found to stop work because of abnormally dangerous conditions. Therefore, I respectfully dissent.

Paul L. Styles, Esq., George L. Card, Jr., Esq., and *Richard P. Prowell, Esq.,* for the General Counsel.[1]

David A. Grant, Esq. and *Betty Southard Murphy, Esq., (Baker and Hostetler),* Washington, D.C., for the Respondent.

William M. Earnest, Esq., and *Robert L. Thompson, Esq. (Elarbee, Thompson & Trapnell),* of Atlanta, Georgia, for the Respondent.

Helen DeHaven, Esq., of Knoxville, Tennessee, for the Charging Party.

William K. Shaw, Jr., Esq., of Portsmouth, Ohio, for the Intervenors.

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[1] Styles served as the Government's litigation counsel at trial; Card and Powell submitted the brief on behalf of the General Counsel.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

TNS, Inc., Johnny Bettis, et al., Intervenors.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

Nos. 85-1459, 85-1740.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 3, 1986.

Decided Dec. 2, 1986.

Union sought review of National Labor Relations Board orders approving private settlement agreements disposing of unfair labor practice charges. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that failure of NLRB to sufficiently explain departure from established precedent in approving private settlements required remand.

Reversed and remanded.

Petitions for Review of Orders of the National Labor Relations Board.

Helen de Haven, Knoxville, Tenn., for petitioner in Nos. 85-1459 and 85-1740.

John D. Burgoyne, Asst. Gen. Counsel, N.L.R.B., with whom Robert E. Allen, Associate Gen. Counsel and Elliott Moore, Deputy Associate Gen. Counsel, N.L.R.B., Washington, D.C., were on brief for respondent in Nos. 85-1459 and 85-1740.

William Merrill Earnest, with whom Robert L. Thompson, Atlanta, Ga., David A. Grant and Betty Southard Murphy, Washington, D.C., were on brief for intervenor, TNS, Inc., in No. 85-1459.

William Shaw entered an appearance for intervenors, Johnny Bettis, et al., in No. 85-1459.

Before EDWARDS, GINSBURG and BORK, Circuit Judges.

Opinion for the Court filed by Circuit Judge EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

In this case, we are called upon to review a series of orders by the National Labor Relations Board ("NLRB" or the "Board"). Over the objection of the Board's General Counsel, the NLRB approved private settlement agreements disposing of certain unfair labor practice charges against TNS, Inc. (the "Company"). The settlement agreements were signed by TNS and fifty-six individual employees, all of whom were members of a bargaining unit represented by the petitioner, the Oil, Chemical and Atomic Workers International Union, AFL-CIO (the "Union"). The Union neither participated in the negotiations leading to the settlement agreements nor approved

the terms of settlement. Because we find that the Board failed to explain its departure from established precedent in approving the private settlements, we remand the case to the Board for further proceedings.

I. Background

A. *Factual Background*

TNS, Inc., an intervenor in this appeal, operates a plant in Jonesboro, Tennessee. In 1981, when the present dispute arose, TNS produced various forms of ammunition made from depleted uranium. Approximately one-hundred employees of TNS were members of the bargaining unit represented by the Union.

On May 1, 1981, bargaining unit employees began a work stoppage allegedly in protest over health and safety conditions at the TNS plaint. After closing down operations for several months, the Company hired permanent replacements for the "striking" workers. This action prompted the Union to file unfair labor practice charges with the NLRB.

The Union charges to the Board alleged that the permanent replacement of workers engaged in a work stoppage under section 502 of the Labor Management Relations Act[1] violated sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA" or the "Act").[2] Section 502 provides that the good faith "quitting of

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[1] 29 U.S.C. § 143 (1982).

[2] *Id.* § 158(a)(1), (3).

labor" because of abnormally dangerous working conditions shall not be deemed a "strike" under the Act. Under established principles of labor law, workers who strike in response to an employer's unfair labor practices normally may not be permanently replaced.[3] Under the Union's theory of the case, workers who engaged in a work stoppage pursuant to section 502 should be deemed the equivalent of unfair labor practice strikers, in which case the employer would violate the Act by hiring permanent replacements. In August of 1982, the NLRB's General Counsel adopted the Union's theory and brought an unfair labor practice complaint against TNS.[4]

While the General Counsel was presenting its case before an Administrative Law Judge ("ALJ"), seventy of the "striking" employees, represented by attorney William Shaw, moved to intervene in the proceedings. Intervention was granted for the limited purpose of allowing Shaw to question certain employees about working conditions at the TNS plant, and perhaps to introduce an expert witness.[5]

At some point thereafter, however, Shaw and TNS began negotiations on a possible settlement of the unfair labor practice charges. At the conclusion of the hearings, Shaw and counsel for TNS presented signed settlement

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[3] *See Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 76 S.Ct. 349, 100 L.Ed. 309 (1956).

[4] Complaint and Notice of Hearing, *reprinted in* Joint Appendix ("J.A.") 176.

[5] *See* J.A. 293-94.

agreements to the ALJ for her approval.[6] Under the terms of the settlement agreements, the employees were each to receive a lump-sum payment of between $2,000 and $12,000. In return, the employees agreed to withdraw from the unfair labor practice proceedings, to waive all future legal claims against the Company, and to waive any right to reinstatement. The monetary payments plainly were not to be considered backpay within the meaning of the Act. Rather, by agreement, the Company and employees specified that the settlement payments were given solely in consideration for the employees' releases of potential personal injury claims arising from their exposure to hazardous conditions at the TNS plant. The Company also agreed to pay Shaw attorney's fees of $450 for each employee who signed a settlement agreement.[7]

The ALJ refused to approve the settlement agreements. She found that Shaw, in being permitted to intervene, had not been granted "standing" to settle the claims of the individual employees.[8] Nor did the employees themselves have "standing" apart from their exclusive representative, the International Union.[9] The ALJ also expressed "very serious concerns" regarding the content

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[6] At that point, 42 TNS employees had signed settlement agreements. Fourteen employees have signed since, bringing the total to 56.

[7] *See* Settlement Agreement, Release and Covenant Not to Sue; Severance Agreement, Release and Covenant Not to Sue, *reprinted in* J.A. 13-22.

[8] *See* J.A. 357.

[9] *Id.*

of the agreements and the manner in which they had been negotiated; in particular, she questioned the propriety of Shaw's attorney's fees and the adequacy of Shaw's legal representation.[10]

B. *The Board's Orders*

In its first in a series of three orders, the Board reversed the ALJ's decision to reject the settlements, and approved them "in principle."[11] It remanded for an additional hearing, however, on the issue of whether the employees had entered into the agreements with voluntary and informed consent. In approving the agreements in principle, the Board rejected the Union's request to examine whether Shaw's actions in negotiating the settlements had been unethical, reasoning that it was not the Board's "function or responsibility to pass on the ethical propriety of an attorney's conduct."[12]

Two months later, the Union, the Company and the individual employees filed a joint motion with the Board stipulating that the employees had executed the settlement agreements with voluntary and informed consent.[13] Accordingly, the parties asked the Board to approve the

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[10] *See* J.A. 358-75.

[11] Telegraphic Order of the Board (Feb. 22, 1985), *reprinted in* J.A. 1.

[12] *Id.*

[13] Joint Motion of Charging Party, Respondent and Intervenors for Amendment of Board's Order and to Approve Settlement Agreements and Releases, *reprinted in* J.A. 6.

agreements without a further hearing. The General Counsel objected, arguing, *inter alia*, that the agreements did not meet the standards articulated by the Board in *Community Medical Services, Inc. ("Clear Haven")*, 236 N.L.R.B. 853 (1978).[14]

On May 16, 1985, the Board approved the settlement agreements over the General Counsel's objections.[15] On October 23, 1985, however, the Board amended its two earlier orders *sua sponte*. In its amended order, the Board elaborated on its reasons for approving the settlements. Citing its decisions in *Combustion Engineering Inc.*[16] and *Coca-Cola Bottling Co.*,[17] the Board explained that it had a "long-standing policy of encouraging resolution of disputes without resort to Board processes."[18] Approval of the agreements was thus "in effect" a *deferral* to private, non-Board settlements, fully consistent with the "general principle which favors settlement over litigation wherever possible."[19]

The Board went on to cite four reasons why giving effect to the proposed settlement agreements would

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[14] General Counsel's Opposition to Joint Motion of Charging Party, Respondent, and Intervenors for Amendment of Board's Order and to Approve Settlement Agreements and Releases, *reprinted in* J.A. 23-32.

[15] Telegraphic Order of the Board (May 16, 1985), *reprinted in* J.A. 2.

[16] 272 N.L.R.B. 215 (1984).

[17] 243 N.L.R.B. 501 (1979).

[18] Unpublished Order of the Board (Oct. 23, 1985), *reprinted in* J.A. 3, 4.

[19] J.A. 4.

"effectuate the policies of the Act."[20] First, the legal and policy issues raised by the unfair labor practice complaint were "novel."[21] Second, the parties had stipulated that the agreements were executed with voluntary and informed consent. Third, the legal issue presented by the unfair labor practice complaint was preserved because not all of the employees had agreed to the settlement.[22] Fourth, there was a risk, inherent in litigation, that the employees might not prevail on the merits. Accordingly, the Board approved the settlements and dismissed the unfair labor practice complaint insofar as it alleged a violation of the Act in connection with the fifty-six employees who had executed settlement agreements.[23] The Union, the exclusive bargaining representative for all of the "striking" employees, filed this petition for review of the Board's orders.

II. Discussion

A. *Departure from Precedent*

In *Clear Haven*, the Board outlined the "well settled," and relatively stringent, two-part legal test to be applied

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[20] J.A. 5.

[21] J.A. 4.

[22] Because not all employees have signed settlement agreements, the ALJ must still rule on the legal question whether employees who engage in a work stoppage over hazardous working conditions may be permanently replaced. At oral argument, counsel informed us that a decision on this question is still pending before the ALJ.

[23] Unpublished Order of the Board (Oct. 23, 1985), *reprinted in* J.A. 3, 5.

in determining "whether or not to approve a settlement agreement and withdrawal of unfair labor practice charges."[24] First, the Board will assume that the case is meritorious and that the General Counsel is prepared to carry her burden of proof.[25] Second, the Board will determine whether the settlement agreement "substantially remed[ies]" the alleged unfair labor practices.[26] Among the most important of the considerations in assessing whether a settlement agreement substantially remedies the alleged unfair labor practices is a determination whether the agreement provides for traditional Board remedies such as reinstatement, backpay and the posting of a notice.[27] The absence of such remedies will strongly militate against the Board's approval of a proposed settlement.

The Board's policy against deference to private settlement agreements is grounded on the well-accepted principle that the Board, having filed an unfair labor practice complaint, proceeds in vindication of the public interest, *not* in vindication of private rights.[28] Therefore, a settlement that seeks dismissal of an unfair labor practice

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[24] 236 N.L.R.B. at 853.

[25] *Id.* at 855-56.

[26] *Id.* at 853 (quoting *Jack C. Robinson*, 117 N.L.R.B. 1483, 1485, *enforced*, 251 F.2d 639 (3d Cir.1957)).

[27] *Id.* at 854; *see also APD Transport Corp.*, 253 N.L.R.B. 468, 470 (1980) (under *Clear Haven*, failure of settlement agreement to provide for backpay and reinstatement falls "far short" of a "substantial remedy"), *enforcement denied on other grounds*, 672 F.2d 323 (3d Cir.1982).

[28] The Board has . . . long recognized that the willingness of a charging party to withdraw charges is not necessarily a ground for dismissal of a complaint "for once

complaint will not be found to be acceptable merely because the private parties to the labor dispute are satisfied with its terms. Rather, the Board must pursue the *public's* interest in discouraging unfair labor practices by ensuring that those practices have been substantially remedied. As the Board observed in *Clear Haven*, "there is an overriding public interest in the effectuation of statutory rights which cannot be cut off or circumvented at the whim of individual [employees]."[29]

In its three orders in this case, the Board made no attempt either to apply the above principles, or to reassess the standards it will use in determining whether to approve a private settlement of an unfair labor practice

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> a charge is filed, the General Counsel proceeds, not in vindication of private rights, but as the representative of an agency entrusted with the power and the duty of enforcing the Act in which the public has an interest."

Clear Haven, 236 N.L.R.B. at 853 (quoting *Ingalls Steel Constr. Co.*, N.L.R.B. 584 n. 1 (1960)).

[29] 236 N.L.R.B. at 855; *see also Ideal Donut Shop*, 148 N.L.R.B. 236, 237 (1964) ("[R]einstatement and backpay are remedies which the Board provides in the public interest to enforce a public right. No private right to such relief attaches to [an employee] which he can bargain away or compromise. . . . "), *enforced*, 347 F.2d 498 (7th Cir.1965).

As this Board precedent makes clear, it is largely irrelevant that some of the "striking" employees have chosen not to settle, thereby preserving for the ALJ the legal question whether employees who engage in a work stoppage over hazardous working conditions may be permanently replaced. The public interest lies not only in resolving the legal issues raised by an unfair labor practice complaint, but in *remedying* the illegal practices, thereby discouraging their recurrence.

complaint. Indeed, the Board approved the settlements without any reference whatsoever to its *Clear Haven* precedent. In so doing, the Board approved settlement agreements that provided for *none* of the traditional remedies ordered by the Board for unfair labor practices. It goes without saying that the Board failed in its recognized obligation to ensure that unfair labor practices have been *substantially* remedied.

In support of its final order, the Board emphasized that the General Counsel's unfair labor practice complaint was "novel," and that there was a risk that the complaint would be found unmeritorious. Yet, under the *Clear Haven* test, for the limited purpose of passing on the acceptability of a proposed settlement, the Board must "of necessity" begin with the assumption that the case *is* meritorious.[30] In the instant case, the Board made no attempt to explain its departure from this well-established principle.

In further support of its final order, the Board cited two cases purportedly illustrative of the Board's "long-standing policy of encouraging resolution of disputes without resort to Board processes."[31] Both cases, however, involved settlement agreements negotiated by the *union* and the employer *pursuant to an established grievance-arbitration procedure.*[32] In deferring to the settlements

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[30] 236 N.L.R.B. at 855-56.

[31] Unpublished Order of the Board (Oct. 23, 1985), *reprinted in* J.A. 3, 4.

[32] *See Combustion Eng'g Inc.*, 272 N.L.R.B. 215 (1984) (agreement between union and employer to settle employee's grievance short of arbitration); *Coca-Cola Bottling Co.*, 243 N.L.R.B. 501 (1979) (same).

in those cases, the Board was promoting the use of the grievance-arbitration process as a means of resolving disputes under the parties' collective bargaining agreement, a recognized policy of the Act.[33] Here, in contrast, the Board deferred to settlement agreements negotiated by the Company and its *individual employees* in derogation of the bargaining relationship between the Company and the Union. The Board failed to identify any policy of the Act that is furthered by deferral under such circumstances. Nor was the Board able, in its brief or at oral argument, to cite a single case in which the Board has deferred to a settlement between an employer and its individual employees over the opposition of the employees' exclusive bargaining representative.

In summary, the Board's "well settled" standards for assessing private settlement agreements such as those reached in this case were delineated in *Clear Haven*. In

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[33] *See, e.g., Alpha Beta Co.*, 273 N.L.R.B. 1546, 1547 (1985) (Board furthers fundamental purposes of the Act by encouraging employers and unions to negotiate their differences, to discuss and settle grievances, and, if necessary, to arbitrate their differences), *appeal docketed sub nom. Mahon v. NLRB*, No. 85-7565 (9th Cir. 1985); *Roadway Express, Inc. v. NLRB*, 647 F.2d 415, 426 (4th Cir.1981):

> [D]eferring to the [grievance] settlement in this case, effected by the union's representative . . . would not be repugnant to the national labor policy of respecting agreements freely made between an employee and employer, where such agreement had been effected under the protection of the employee's bargaining agent. . . . That certainly is promoting the use of the collective bargaining agent in resolving peaceably and amicably grievances and this is one of the primary purposes of the National Labor Relations Act.

this case the Board departed from those standards without explanation (and without even citing *Clear Haven*). We need hardly elaborate on the settled principle that an agency may not depart from its precedent without explaining and justifying its change in position.[34] We therefore remand this case to the Board "for further consideration (or explanation)" of its reasons for approving the private settlement agreements.[35]

B. *The Issues to be Addressed on Remand*

Apart from the Board's departure from well-established precedent, the orders here under challenge raise several additional concerns. We will briefly highlight these matters so that they, too, will be addressed by the Board on remand.

First, we find it disturbing that the Board foreclosed all inquiry into the ethical conduct of the attorney for the

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[34] *See, e.g., Columbia Broadcasting Sys. v. FCC*, 454 F.2d 1018, 1026 (D.C.Cir.1971) ("[W]hen an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.") (footnote omitted); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.") (footnotes omitted), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971).

[35] *See Darr v. NLRB*, 801 F.2d 1404, 1409 (D.C.Cir.1986) (remanding for further consideration or explanation of Board's decision to defer to an arbitrator's award).

individual employees, who was paid $450 *by the Company* for each employee who signed a settlement agreement. Had the Company made such payments to a Union attorney, it surely would have been guilty of an unfair labor practice.[36] Payments by the Company to an independent attorney acting in place of the employees' duly authorized bargaining agent raise equal, if not heightened, concerns. At a minimum, in discharging its responsibility for approving the settlements, the Board had an obligation to ensure that the agreements were not procured through unethical attorney conduct.[37]

Second, we find it highly questionable – especially outside the grievance-arbitration context – for the Board to approve settlements and dismiss unfair labor practice charges *merely* on a showing that the settlements were "voluntary." As noted in *Clear Haven,* the Board is the "agency entrusted with the power and the duty of enforcing the Act in which the public has an interest."[38] We

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[36] Section 8(a)(2) of the Act makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." 29 U.S.C. § 158(a)(2) (1982).

[37] *See, e.g., NLRB v. Autotronics, Inc.,* 596 F.2d 322, 325 (8th Cir.1979) (refusing to enforce Board order where Board failed to give "meaningful consideration" to charges that a settlement was procured by the unethical conduct of a Board attorney); *Feld & Sons, Inc.,* 236 N.L.R.B. 332, 337-38 (1982) (in response to charges that attorney misconduct infected the settlement process, Board remands to administrative law judge "for the purpose of taking testimony concerning the circumstances surrounding the execution of the Settlement Agreement").

[38] 236 N.L.R.B. at 853 (quoting *Ingalls Steel Constr. Co.,* 126 N.L.R.B. 584 n. 1 (1960)).

think this duty to the public is abdicated where the Board makes absolutely no inquiry into the terms on which the unfair labor practices have been settled. If the Board is not going to insist that the settlements provide "substantial" relief for the unfair labor practices – as mandated by *Clear Haven* – it must, at a minimum, inquire into whether the settlement terms are reasonable.[39]

Along these lines, we find it especially disturbing that the settlements in this case provided no remedy whatsoever for the Company's alleged unfair labor practices. The monetary payments received by the employees were solely in consideration for the release of personal injury claims; the employees received neither reinstatement nor backpay (nor any other consideration) for the dismissal of their unfair labor practice charges. So far as we can discern, the Board has never, even in the grievance-arbitration context,[40] approved a settlement providing *no remedy* for an alleged unfair labor practice. Board counsel could cite no such authority.

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[39] In this respect, we find the Board's duty at least as great as that of a district court judge charged with the responsibility for approving class action settlements. *See* FED.R.CIV.P. 23(e); *Armstrong v. Board of School Directors*, 616 F.2d 305, 313 (7th Cir.1980) (district court may approve class action settlement only if it finds settlement "fair, reasonable and adequate").

[40] *See, e.g., Combustion Eng'g Inc.*, 272 N.L.R.B. 215 (1984) (both company and union made concessions to settle employee's grievance; employee was reinstated but without backpay); *Coca-Cola Bottling Co.*, 243 N.L.R.B. 501 (1979) (same).

III. Conclusion

For the foregoing reasons, the orders of the Board are reversed, and the case remanded to the Board for further proceedings not inconsistent with this opinion.

So Ordered.

TNS, Inc. *and* Oil, Chemical and Atomic Workers International Union, AFL-CIO. Case 10-CA-17709

March 9, 1988

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS JOHANSEN, BABSON, AND CRACRAFT

On February 22, May 16, and October 23, 1985, the Board issued Orders[1] deferring to non-Board settlement agreements and dismissing portions of an unfair labor practice complaint issued against the Respondent. On petition to review the Board's Orders, the United States Court of Appeals for the District of Columbia Circuit reversed the Board's Orders and remanded the case to the Board for further consideration.[2] The Board thereafter accepted the court's remand and notified the parties that they could file statements of position with the Board on remand. The General Counsel, the Charging Party, and the Respondent filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On August 18, 1982, the General Counsel issued a complaint against the Respondent alleging that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate employees who had engaged in a work stoppage because of their good-faith belief that

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[1] Not reported in bound volumes. Members Babson and Cracraft did not participate in the Board's prior Orders in this case.

[2] *Chemical Workers International Union v. NLRB*, 806 F.2d 269 (D.C. Cir. 1986).

working conditions at the plant were "abnormally dangerous." The hearing on the merits of the case commenced on November 7, 1983, before Administrative Law Judge Arline Pacht. On January 13, 1984, attorney William K. Shaw Jr. moved to intervene on behalf of approximately 70 employees, and the judge granted limited intervention.

On December 17 and 18, 1984, the final 2 days of the hearing, Shaw presented to the judge for approval non-Board settlement agreements that he had reached with the Respondent and that had been presented to and accepted by 56 employees. The settlement agreements provided that the employees would each receive, depending on seniority, lump-sum payments of between $2000 and $12,000 which, according to the settlement, "are not wage payments or backpay within the meaning of the NLRA but the sole consideration for said payments is the release of all claims by the individual employee listed herein for damages for personal injury or illness arising from the alleged exposures to depleted uranium and its alleged radiological and toxiological effects." In return, the agreements provided that the individual employees would not sue or assert any charge or complaint against the Respondent based on the Act or various other Federal statutes and would release the Respondent from any and all present and future claims arising out of their employment with the Respondent. It was also specified that the agreements and payments were not to be deemed as an admission of liability on the part of the Respondent; that the agreements constituted a compromise "of doubtful and disputed claims"; that the charge before the Board was "of questionable merit" under which employees

were "unlikely" to recover any backpay; and that the agreements would be governed by the law of the State of Tennessee. Finally, the agreements provided that for each employee who signed the agreement, the Respondent would pay Shaw $450, "representing all attorney's fees, costs and/or expenses arising out of his [Shaw's] representation of the undersigned [employees]" and that the monetary payments provided in the agreements would be contingent on the prior approval of the Board or administrative law judge.

At the hearing on December 18, 1984, the judge rejected the settlement agreements, expressing concern that Shaw had no standing as a limited intervenor to negotiate or present to the judge the settlement agreements to the exclusion of and over the objections of the Charging Party and the General Counsel; that Shaw might have engaged in unethical conduct by negotiating for his fee as part of the agreements; that the employees were not properly advised before they signed the agreements; that the agreements stated that they would be governed by the laws of the State of Tennessee; and that not all the employees involved in the work stoppage agreed to the terms of the settlement.

The Respondent filed a request for special permission to appeal the judge's refusal to approve the settlement agreements. On February 22, 1985, the Board granted the request, approved the proposed settlement agreements in principle, and remanded the case for a further hearing with respect to the employees' voluntary and informed consent regarding the execution of the agreements. Regarding the Charging Party's allegation in its opposition to the Respondent's special appeal request, the Board

stated that it was not the Board's function or responsibility to pass on the ethical propriety of an attorney's conduct.

On April 22, 1985, the Charging Party, the Respondent, and the Intervenors filed a joint motion with the Board asking it to amend its February 22, 1985 order and approve the settlement agreements. In their motion the parties stipulated that the employees executed the settlement agreements with "informed and voluntary consent" and that a hearing on such issues was unnecessary. On May 16, 1985, the Board granted the joint motion.

On October 23, 1985, the Board issued an Order, amending sua sponte its prior orders. The Board noted its longstanding policy of encouraging resolution of disputes without resort to Board process, citing *Combustion Engineering*, 272 NLRB 215, 217 (1984); and *Coca Cola Bottling Co.*, 243 NLRB 501, 502 (1979). The Board also noted that the case involved novel legal and policy issues, the parties stipulated that the agreements were executed by the employees with informed and voluntary consent, the legal issue presented in the case was not affected by these non-Board settlement agreements, and there was a basic risk inherent in litigation. The Board concluded that it would effectuate the policies of the Act to give effect to the agreements. Accordingly, the Board dismissed the complaint insofar as it alleged a violation of the Act in connection with the 56 employees who executed settlement agreements.

The Charging Party filed a petition for review of the Board's Orders with the United States Court of Appeals for the District of Columbia Circuit. On December 2, 1986,

the court issued its opinion, finding that the Board failed to explain its departure from established precedent in approving the settlement agreements and remanding the case to the Board for further proceedings.

The court faulted the Board for failing, without explanation, to apply the test articulated in *Clear Haven Nursing Home,* 236 NLRB 853 (1978), for determining whether to approve a settlement agreement. The court pointed out that under the *Clear Haven* test:

> First, the Board will assume that the case is meritorious and that the General Counsel is prepared to carry her burden of proof. Second, the Board will determine whether the settlement agreement "substantially remed[ies]" the alleged unfair labor practices. Among the most important of the considerations in assessing whether a settlement agreement substantially remedies the alleged unfair labor practices is a determination whether the agreement provides for traditional Board remedies such as reinstatement, backpay and the posting of a notice. The absence of such remedies will strongly militate against the Board's approval of a proposed settlement. [Footnotes omitted.]

The court noted that once an unfair labor practice proceeding is instituted, the Board proceeds "in vindication of the public interest, *not* in vindication of private rights," and that therefore private settlements will not be found acceptable "merely because the private parties to the labor dispute are satisfied with its terms."

The court asserted that:

> In its three orders in this case, the Board made no attempt either to apply the above principles, or to reassess the standards it will use in determining whether to approve a private settlement of an unfair labor practice complaint. Indeed, the Board approved the settlements without any reference whatsoever to its *Clear Haven* precedent. In so doing, the Board approved settlement agreements that provided for *none* of the traditional remedies ordered by the Board for unfair labor practices. It goes without saying that the Board failed in its recognized obligation to ensure that unfair labor practices have been *substantially* remedied. [Emphasis in original.]

The court distinguished the cases cited by the Board in its final order on the ground that the settlement in those cases were negotiated by the union and the employer pursuant to an established grievance-arbitration procedure whereas the settlements in the instant case were negotiated by the Respondent and its "*individual employees* in derogation of the bargaining relationship between the Company and the Union."

Accordingly, the court remanded the case to the Board " 'for further consideration (or explanation)' of its reasons for approving the settlement agreements." In addition, the court directed the Board to address several other questions. First, the court found it "disturbing that the Board foreclosed all inquiry into the ethical conduct of the attorney for the individual employees, who was paid $450 *by the Company* for each employee who signed a

settlement agreement." The court stated that, "[a]t a minimum, in discharging its responsibility for approving the settlements, the Board had an obligation to ensure that the agreements were not procured through unethical attorney conduct."

Second, the court found it "highly questionable – especially outside the grievance-arbitration context – for the Board to approve settlements and dismiss unfair labor practice charges *merely* on a showing that the settlements were 'voluntary.' " According to the court, "[i]f the Board is not going to insist that the settlements provide 'substantial' relief for the unfair labor practices – as mandated by *Clear Haven* – it must, at a minimum, inquire into whether the settlement terms are reasonable."

Finally, the court observed:

> [W]e find it especially disturbing that the settlements in this case provided no remedy whatsoever for the Company's alleged unfair labor practices. The monetary payments received by the employees were solely in consideration for the release of personal injury claims; the employees received neither reinstatement nor backpay (nor any other consideration) for the dismissal of their unfair labor practice charges. So far as we can discern, the Board has never, even in the grievance-arbitration context, approved a settlement providing *no remedy* for an alleged unfair labor practice. [Emphasis in original; footnote omitted.]

Recognizing that the court's opinion is the law of the case, we shall apply the court's observations and reasoning to the issue of whether to approve the settlement agreements.

The Board has recently in *Independent Stave Co.*, 287 NLRB 740 (1987), addressed the issue of the test to be applied by the Board in reviewing settlement agreements.[3] The Board, overruling *Clear Haven*, rejected "the limited approach to settlement agreements set forth in *Clear Haven* in favor of an expanded approach which will evaluate the settlement in light of all factors present in the case to determine whether it will effectuate the purposes and policies of the Act to give effect to the settlement." In this regard, the Board stated that it will "examine all the surrounding circumstances including, but not limited to, (1) whether the Charging Party(ies), the Respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has

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[3] The companies in *Independent Stave* alleged that the respondent violated Sec. 8(a)(1) and (3) by refusing to hire four employees because they had held offices with the union. Three of the discriminatees entered into settlement agreements with the respondent, accepting employment, retroactive seniority, and $350 in return for requesting the withdrawal of the unfair labor practice charges. The agreements were approved by the union. The Regional Director refused to approve the withdrawal requests of the unfair labor charges because the agreements did not fully remedy the alleged unfair labor practices. The respondent then filed a Motion for Summary Judgment with the Board.

breached previous settlement agreements resolving unfair labor practice disputes."

Examining the settlement agreements in *Independent Stave* in light of these factors, the Board approved the agreements. The Board noted that the three discriminatees, who were also the charging parties, the respondent, and the union, all approved the settlement, and the case was settled 10 days after issuance of the complaint. Viewing the settlements against the customary risks inherent in any litigation and in light of the early stage of the proceedings and the nature of the allegations, the Board found the settlements to be reasonable. Noting also that there was no evidence of fraud, coercion, or duress or of prior violations or breaches of prior agreements committed by the respondent, the Board concluded that "honoring the parties' agreements advances the Act's purpose of encouraging voluntary dispute resolution, promoting industrial peace, conserving the resources of the Board, and serving the public interest."

Examining the present settlement agreements in light of *Independent Stave* and the court's opinion, we find that the policies underlying the Act would not be effectuated by our approving them. Unlike *Independent Stave*, both the Charging Party and the General Counsel oppose the settlement agreements. Further, particularly given the court's determination, by which we are bound, that the agreements provided "no remedy whatsoever" for the alleged unfair labor practices, we find the agreements to be unreasonable. In this regard, we also note that the agreements were reached more than 2 years after complaint issued and at the conclusion of a lengthy hearing. Although we recognize that this case presents novel and

complex issues of law which may involve unusual litigation risks, we find this factor outweighed by those enumerated above in the determination of reasonableness. We additionally are cognizant that the Respondent has no history of violating the Act or of breaching prior settlement agreements. Nevertheless, in light of the opposition of the General Counsel and the Charging Party and our finding that the settlement agreements were not reasonable, we cannot approve them.[4] Accordingly, we vacate the Board's prior Orders of February 22, May 16, and October 23, 1985, and reinstate the complaint insofar as it alleges a violation of the Act in connection with the 56 employees who have executed settlement agreements.

ORDER

The National Labor Relations Board orders that its prior Orders of February 22, May 16, and October 23, 1985, are vacated and that the complaint insofar as it alleges a violation of the Act in connection with the 56 employees who have executed settlement agreements is reinstated.

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[4] In light of this finding it is unnecessary to inquire into the ethical propriety of attorney Shaw's conduct as directed by the court.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1299 **September Term, 1994**

Oil, Chemical and Atomic Workers
International Union, AFL-CIO,

Petitioner,

v.

National Labor Relations Board,

Respondent

PETITION FOR REVIEW OF ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BEFORE: **Edwards**, Chief Judge; **Ginsburg** and **Tatel**, Circuit Judges

JUDGMENT

(Filed Feb. 14, 1995)

This cause came on to be heard on the petition for review of an order of the National Labor Relations Board and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the case is remanded for further proceedings, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
FOR THE COURT:

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Date: February 14, 1995

Opinion for the Court filed by Chief Judge Edwards.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1299 **September Term, 1994**

Oil, Chemical and Atomic Workers International Union, AFL-CIO,

Petitioner,

v.

National Labor Relations Board,

Respondent

BEFORE: Edwards, Chief Judge; Ginsburg and Tatel, Circuit Judges

ORDER

(Filed Apr. 24, 1995)

Upon consideration of intervenor's Petition for Rehearing, filed March 31, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk